In the Supreme Court of the United States

OCTOBER TERM, 1914

ISABELLA GONZALES, APPELLANT,

v.

WILLIAM WILLIS, UNITED STATES COMMISSIONER OF IMMIGRATION, PORT OF NEW YORK.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES

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STATEMENT.

This is the case of a native young woman of Porto Rico, who sought to enter this country at New York and was excluded by the immigration authorities on the ground that she was likely to become a public charge. Habeas corpus was issued from the circuit court upon application in her behalf, and that court held that the executive action was authorized by law, and dismissed the writ. The appeal to this court followed.

The case thus raises another aspect of the insular situation, the question here being whether the

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native inhabitants of the insular territorial possessions of the United States are subject to be excluded from this country under the immigration laws as *aliens*.

The treaty with Spain of 1899 (30 Stat., 754), ceding Porto Rico and the Philippine Islands, provides (Art. IX) that Spanish subjects, natives of the peninsula, residing in the ceded territory, may remain there, or may remove, owing obedience to the law and subject to protection, and may preserve their allegiance to Spain by a certain declaration, in default of which they shall be held to have renounced that allegiance "and to have adopted the *nationality* of the *territory* in which they may reside." "The civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress." Pursuant to this stipulation, Congress provided by section 7 of the Porto Rican act of 1900 (31 Stat., 77) that, excepting those previous Spanish subjects who had duly elected to preserve their allegiance to Spain under the treaty, all inhabitants continuing to reside therein who were Spanish subjects on the 11th day of April, 1899, and then resided in Porto Rico, and their children born subsequent thereto, "*shall be deemed and held to be citizens of Porto Rico, and as such entitled to the protection of the United States*, * * * and they, together with such citizens of the United States as may reside in Porto Rico, shall constitute a body politic under the name of The People of

Porto Rico, with governmental powers as hereinafter conferred, and with power to sue and be sued as such."

The independence of people of Porto Rico in full measure was preserved, their rights in public property defined and assured, and the unusually complete autonomy of the local government provided for by this act (e. g., secs. 12, 13, 15, 18, 27, 39, etc.). From these sections it appears that particular care was taken to preserve the separate and distinct status of the people and the government of Porto Rico, and to avoid any incorporation in the United States of this appurtenant territory.

I quote for the information of the court, and for purposes of comparison, the corresponding provisions of law relative to the Philippine Islands in an act pursuant to the same stipulation of the treaty.

The army appropriation act of 1901 (31 Stat., 895, 910—the "Spooner resolution") contains certain provisions for the establishment of a temporary civil government in the Philippine Islands, "and for the purpose of maintaining and protecting the inhabitants of said islands in the free enjoyment of their liberty, property, and religion." The act of July 1, 1902 (32 Stat., 691), ratified the establishment of the temporary civil government. Section 4 of that act provided that the same class of former Spanish subjects in the Philippine Islands as in the case of Porto Rico, that is, excepting

those who shall have elected to preserve their allegiance to the Crown of Spain, "shall be deemed and held to be citizens of the Philippine Islands, and as such entitled to the protection of the United States." Section 5 of that act is a declaration of rights for the Philippine Islands. In general, this act constitutes the government of the Philippine Islands under the civil governor and the Philippine Commission, in the same way and for the same purposes of establishing local rights and autonomy, as fully as possible, distinct from the United States, as the Porto Rican act did for Porto Rico. See the act, *passim*, and especially section 12 as to the transfer of public property to the Philippine government to be administered for the benefit of the inhabitants thereof; section 13 as to the disposal of public lands; section 17 as to the lease or sale of any portion of the public domain, or for timber license which shall be covered into the insular treasury for insular purposes according to law; section 72 as to the application of proceeds of insular bonds authorized to be issued and sold. All these provisions, as well as the law relating to the grant of franchises (sec. 74), show the regard paid to the local rights and concern in such matters and of the separation of these local public interests free from incorporation in the United States in any just sense beyond the character of appurtenant territory.

Judge Lacombe (rec., pp. 7–8) took the view that since the petitioner was by birth an alien and

has not been naturalized in any appropriate way, she is still an alien and subject to the alien immigration laws; that, unlike previous treaties in somewhat analogous situations, the treaty of Paris did not make the native inhabitants of Porto Rico citizens of the United States, but reserved that question for Congress to determine, and that section 7 of the Porto Rican act did not operate to effect naturalization. The assignments of error (pp. 11–12) are all reducible to the fourth, viz:

> In holding that the petitioner is subject to the provisions of the statutes of the United States regulating the admission of aliens.

ARGUMENT.

I.

THE SCOPE OF THE WORD "ALIENS."

This is an inquiry in which uncompromising insistence on mere words must be avoided. Terminology ought not to be permitted to be tyrannical, so to speak, nor a term be viewed as possessing an unalterable and invariable value for all times and in all situations. We should not be controlled too rigorously by the notion of unbending logical and etymological categories. To so rule would be to accept names or definitions for the real idea and concept. Therefore, to dwell and insist upon an academic and unchanging sense in the word "alien" is not helpful or conclusive. It will not do simply to reiterate in various ways the following proposition: that *alien* means this or that precise

thing and nothing else; that thus accredited definitions and established usage show that this woman is not an "alien;" that whatever else she may be, she is not an *alien*; that this statement is conclusive of the controversy.

Counsel must not urge too sweepingly that the terms "alien," "citizen," "subject," are absolutely and definitely inclusive, and *per contra* mutually exclusive. I submit that these logical categories are neither mutually exclusive nor completely comprehensive. We must observe a similar caution respecting other terms which touch the topic, like "native," "foreigner," "denizen," "resident." All these words are *inter se* synonymous, correlative, or antithetic, but not completely so. The meanings are relative rather than absolute; they shade off into each other, and the outlines of the delimitation are not sharp, but hazy. Let us see what some of the approved definitions of our three principal terms say.

The Standard Dictionary defines *citizen* as "a member of a nation or sovereign State, especially of a republic; one who owes allegiance to a government and is entitled to protection from it;" *subject*, as "one who is under the governing power of another; specifically an individual member of a nation as related to its ruler or government;" *alien*, as "one who owes allegiance to a foreign government; a foreigner; especially an unnaturalized resident foreigner * * *."

In Bouvier's Law Dictionary the definitions of these terms are as follows:

> *Citizen:* One who, under the Constitution and laws of the United States, has a right to vote for Representatives in Congress and other public officers, and who is qualified to fill offices in the gift of the people.
>
> *Subject:* An individual member of a nation who is subject to the laws. In monarchical governments * * * one who owes permanent allegiance to the monarch.
>
> *Alien:* One of foreign birth. * * * In the United States, *one born out of the jurisdiction of the United States and who has not been naturalized under their Constitution and laws.*

In the case of *Dred Scott* v. *Sandford* (19 How., 393, 404) Chief Justice Taney said:

> The words "people of the United States" and "citizens" are synonymous terms and mean the same thing. They both describe the political body who, according to our republican institutions, form the sovereignty, and who hold the power and conduct the Government through their representatives. They are what we familiarly call the "sovereign people," and every citizen is one of this people and a constituent member of this sovereignty.

And Chief Justice Waite said in *United States* v. *Cruikshank* (92 U. S., 542):

> Citizens are the members of the political community to which they belong. They

> are the people who compose the community, and who, in their associated capacity, have established or submitted themselves to the dominion of a government for the promotion of their general welfare and the protection of their individual as well as their collective rights.

I think it may properly be said that we are to regard here, without predilection drawn from definitions, the policy, purpose, reason, and intention of the various laws, and to weigh the inclusion and import of the term *alien* in the light of the spirit and meaning of the law.

I am aware that in the *De Lima* case there was a similar dilemma. The plaintiffs urged that a *foreign* country is one under a sovereignty other than that of the United States. They said that a foreign port is one "within the dominions of a foreign sovereign and without the dominions of the United States" (citing Mr. Justice Story in *United States* v. *Hayward*, 2 Gall., 501); that the idea of merely acquiring the territory ruled the question and not the withholding of political rights. The United States contended that the acquired territory became "a part of the nation to which it is annexed, but on the terms stipulated in the treaty or on such as the new master shall impose;" that it became subject to the United States and appurtenant, but in the international sense, as to relations to all the rest of the world; it did not become domestic in any other sense; and consequently, that until the status was

further changed by legislation, Porto Rico remained "foreign" and articles from there "imports" under the tariff laws; that "newly acquired territory does not become a part of the United States in the legislative sense until Congress shall so determine."

The opinion of the court thus states the Government contention (182 U. S., p. 181):

> But it is earnestly insisted by the Government that it never could have been the intention of Congress to admit Porto Rico into a customs union with the United States, and that while the island may be to a certain extent domestic territory, it still remains a "foreign country" under the tariff laws until Congress has embraced it within the general revenue system. The goods were not admittedly imported; they were not brought into New York from a confessedly foreign country.

The court stated the single question to be whether territory acquired by the United States by cession from a foreign power remains a "foreign country" within the meaning of the tariff laws.

After reviewing prior decisions of the court and the executive rulings and practice, the court said that there is no authority " for holding that a district ceded to and in the possession of the United States remains for any purpose a foreign country." And proceeding then to deal with the question as an original one, and regarding the

power exercised by Congress for a century (whatever be the particular source of the power under the Constitution), the opinion states that—

> Territory thus acquired can remain a foreign country under the tariff laws only upon one of two theories: either that the word "foreign" applies to such countries as were foreign at the time the statute was enacted notwithstanding any subsequent change in their condition, or that they remain foreign under the tariff laws until Congress has formally embraced them within the customs union of the States. The first theory is obviously untenable. While a statute is presumed to speak from the time of its enactment, it embraces all such persons or things as subsequently fall within its scope, and ceases to apply to such as thereafter fall without its scope. * * * By parity of reasoning a country ceases to be foreign the instant it becomes domestic. * * * The theory that a country remains foreign with respect to the tariff laws until Congress has acted by embracing it within the customs union presupposes that a country may be domestic for one purpose and foreign for another. * * * We are unable to acquiesce in this assumption that a territory may be at the same time both foreign and domestic.

I do not challenge in the least respect the final determination of the court on the *De Lima* issue; but I say the issue here on the word "alien," however similar in a general way, is essentially

different. It affects persons and not things, people of foreign race and previous alien relations, and not a foreign country. It presents immigration laws and not tariff laws, and the purpose and motive of the former laws differ greatly in nature and object from those of the revenue laws. Opposing counsel made their claim in the *De Lima* case on the mere acquisition of the territory, and in arguing that the withholding of political rights could not affect that question, practically conceded that this reservation differentiated the two questions.

And finally, where contemporaneous with the acquisition there was no withholding of the domestic status so as to affect the tariff relations, there was on the civil status and political rights a reservation which we contend must rule the present situation and retain the alien character. I submit that it is one thing to hold that Porto Rico under the treaty and tariff laws became domestic and instantly ceased to be foreign, and it is quite a different thing to say that a Porto Rican person under the treaty, the organic act, and the immigration laws instantly ceases to be an alien. Consequently I submit that this woman is certainly not a citizen and is still an alien within the meaning of the immigration laws; that the *De Lima* decision as to the word "foreign" does not hold us to a narrow, logical inclosure, or determine that the word "alien" must be etymologically construed in one sense and one only.

II.

THE APPELLANT IS NOT A CITIZEN, AND IS TO BE REGARDED AS AN ALIEN UNDER THE IMMIGRATION LAWS.

It is certain that Isabella Gonzalez is not a citizen of the United States. She was born an alien; as held by Judge Lacombe, she has not become a citizen under any fundamental and constitutional right nor under any law providing either for individual or collective naturalization. Nor is she a "subject;" there is no need for alarm over that term. She is *subject*, in the adjective use of the word, to the sovereignty and laws, to the jurisdiction of the United States as citizens are, and as unqualified aliens are. These latter become in all substantial respects completely subject to our Government when domiciled or temporarily sojourning within our jurisdiction, and are said, therefore, to owe allegiance *pro tempore*. She is not *a subject* in the substantive use of the term simply because in ordinary parlance that word has a conventional meaning and denotes a constituent member of the body politic in a monarchical or imperial government. *Citizen*, on the other hand, in that sense, denotes a member of a republic. It seems that the word "nationals," as currently used, signifies all persons who belong to, who constitute the objects of, any particular government, whether they are citizens, subjects, or in some intermediate category qualifying the ordinary conception of those two terms. All such

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people are called nationals *quoad* the particular sovereignty under which they live, as distinguished from all other peoples on the face of the earth. The suggestion is, after all, a matter of terminology, of the conventional and convenient use of language, and the growing use of the noun *national* does not throw any particular light upon our investigation.

Let it be granted that such people are nationals. It is conceded that they are connected with this Government by a certain tie distinguishing them from other ordinary foreigners with separate governmental relations; that they owe allegiance to and are under the protection of the United States, and that their natural and original alienage has been so far qualified. All this does not resolve the question. Such facts do not operate to confer citizenship, and it remains to be determined whether these various native islanders have this particular right of a citizen of free ingress into the United States, or rest under the corresponding disabilities of an alien notwithstanding the qualification of their alienage.

Put the question another way: Must Congress be held to have intended that all who were not aliens in the strict and unrelieved sense should escape the immigration laws, or, on the other hand, that all who were not citizens should be subject to them? Is construction to confer upon the ambiguous class which lies between the privilege of free ingress, or deny it? Is the true test nonalienage, narrowly regarded, or noncitizenship?

The solution of the controversy is dependent solely on the proper construction of the law. Constitutionality is not really involved. It may be suggested that, since there are certain broad principles upon which the Constitution rests, which are necessarily recognized by it and which are always to be summoned in aid of its meaning, by force of these principles the law to be construed here should be interpreted in favor of the right. For instance, it might be said that, recognizing all men as free and equal, the spirit and historical policy of this nation regards all men as possessing in general many equal rights here, whether citizens or not; that, starting out to admit and welcome to this country as one of the fundamental tenets of our peculiar calling among the nations *all persons* no matter what their nationality and previous condition, any proscription must be very clear. Hence, it might be concluded that this atmosphere of the Constitution pervades the inquiry, and although in the process of time successive limitations of this broad hospitality have been imposed in our sovereign power and for the general welfare, yet restriction must be scrutinized closely, must be beyond ambiguity even in its application to admitted aliens, and where there is an important qualification of alienage, the case must be regarded as *a fortiori*.

But I maintain that any such appeal to the doctrines surrounding the Constitution is remote and without force. The Constitution is silent on this

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subject, and, reasonably read, suggests no rule even by vague inference. It can not be doubted that there is here no such definite constitutional obstacle as was claimed to exist relative to insular tariff taxation in the uniformity clause. There can be no question of the sovereign competence of Congress, now or at any time, to regulate or restrict the entry into this country of natives of our appurtenant territories. It is rightly to be assumed that such regulation or restriction would be based on just and reasonable grounds. The act now before the court is manifestly based upon such grounds. The sole question is whether it is to be construed so as to include these island natives.

III.

PRECEDENT AND SIMILAR SITUATIONS.

The treaty with France for the cession of Louisiana, ratified October 21, 1803, contained the provision (Art. III) that—

> The inhabitants of the ceded territory shall be incorporated in the Union of the United States and admitted as soon as possible according to the principles of the Federal Constitution to the enjoyment of all the rights, advantages, and immunities of citizens of the United States, and in the meantime they shall be maintained and protected in the free enjoyment of their liberty, property, and the religion which they profess.

The act of October 31, 1803 (2 Stat., 245), enabled the President to take possession of the ceded territory; and the acts of March 26, 1804 (id., 283), and of March 3, 1805 (id., 331), provided a temporary government. By section 5 of the former act "the inhabitants of the said territory" were entitled to the benefits of the writ of habeas corpus, and to bail in certain cases. Section 10 prohibited the importation of slaves "except by a citizen of the United States removing into said territory for actual settlement." By the act of February 20, 1811 (id., 641), the inhabitants of the territory were authorized to form for themselves a constitution and State government.

The treaty with Spain, ratified October 29, 1820 (8 Stat., 252), by which Florida was ceded to the United States, contained a similar provision for the incorporation of the inhabitants of the territory into the Union, "as soon as may be consistent with the principles of the Federal Constitution," and for their admission to the enjoyment of all the privileges, rights, and immunities of the citizens of the United States. The President was authorized by act of March 3, 1819 (3 Stat., 523), to take possession of Florida and establish a temporary government. The act of March 3, 1821 (id. 637), extended the revenue and slave laws of the United States to the ceded territory; and the act of March 30, 1822 (id. 654), established a Territorial government. Section 10 of the latter act provided for the protection of the inhabitants in

their liberty, property, and religion; entitled them to the benefit of habeas corpus, to bail, etc. The act also extended to Florida the laws of the United States not repugnant to the provisions of the act.

The treaty of Guadalupe Hidalgo (9 Stat., 922), by which Mexico ceded California to the United States, provided (Art. VIII):

> Those who shall prefer to remain in the said Territories, may either retain the title and rights of Mexican citizens, or acquire those of citizens of the United States. But they shall be under the obligation to make their election within one year from the date of the exchange of ratifications of this treaty; and those who shall remain in the said Territories after the expiration of that year, without having declared their intention to retain their character of Mexicans, shall be considered to have elected to become citizens of the United States.

Article IX provided that those who should not preserve the character of citizens of Mexico should be incorporated into the Union and be admitted, at a time to be determined by Congress, to the enjoyment of all the rights of citizens of the United States; and in the meantime should be maintained and protected in the free enjoyment of their liberty, etc.

The treaty of March 30, 1867, with Russia, by which Alaska was acquired, provided by Article III (15 Stat., 539) that the inhabitants of the ceded territory might preserve their allegiance to

Russia, returning there within three years, but if they should prefer to remain, they "with the exception of uncivilized native tribes, shall be admitted to the enjoyment of all the rights, advantages, and immunities of the citizens of the United States."

We agreed in these cases that the inhabitants should eventually be admitted to citizenship. In practice the matter was necessarily complicated by application to people of many different races and kinds, citizens of the United States domiciled in the territories previously foreign, or actually themselves foreign subjects for a time and then repatriated by the acquisition; "native inhabitants" of European birth and allegiance; aboriginals falling into the peculiar Indian relations to their tribes and the nation; various varieties of half-breeds and negroes, free and slave. But the fundamental principle which disposed of all these attachments of different nature in an orderly way, maintained the hiatus between a status wholly foreign and one wholly domestic until full incorporation of the inhabitants as citizens, and of the territory as Territory or State, came about.

In *United States* v. *Laverty* (3 Mart., 733; Fed. Cas. No. 15569a) citizenship was claimed by virtue of the treaty with France ceding Louisiana to the United States, which provided that the inhabitants of the ceded territory should be incorporated in the Union and be admitted to citizenship as soon as possible. The treaty was concluded in 1803,

but the territory was not admitted to the Union until 1812; and the opinion of the court intimates that prior to its admission its inhabitants were not regarded as citizens.

This case appears to me significant and instructive, and I dwell on it somewhat. During the war of 1812 certain persons of British birth who were arrested as alien enemies claimed that they were *bona fide* inhabitants of the Territory of Orleans at the time of its admission into the Union, and thus became citizens of Louisiana and of the United States. The Government contention was that Congress alone may naturalize foreigners by a uniform rule. The opposing contention was that the power to admit new States is not inconsistent and admission operates as collective naturalization. The court points out that in pursuance of an act of 1802 the inhabitants of the Ohio portion of the Northwest Territory were authorized to form a State government and subsequently the State was admitted; that the population, governed previous to admission by the "Ohio ordinance," consisted partly of citizens of the United States and partly of foreigners—"a great body of aliens resided among them;" that the real inhabitants of the country, citizens or foreigners, were authorized to form a State government and the act of admission made no distinction. In the Louisiana case it had been contended (the court points out) that the inhabitants who were to be, by the treaty,

admitted to the immunities of citizens were only those who were inhabitants in 1803, and therefore that the act of 1811 which enabled "the people of the Territory of Orleans" to form a State government did not include those becoming inhabitants after 1803. But the court held otherwise, and declares the law not to mean merely the inhabitants at the date of the treaty; that the only question was whether Congress had the right to include any others than citizens in their act of admission, which had been answered affirmatively by the Ohio precedent. The court held that if the treaty provision for admission meant that nevertheless there should be individual compliance with a uniform rule of naturalization, then the old Louisianians were not citizens yet, for they had not complied with that law. The court thus repelled the notion that the treaty stipulation, by not providing for regular naturalization, was unconstitutional and void. And so in the present case the treaty stipulation, leaving a burden, as it were, by explicitly withholding citizenship rights, is no more to be challenged than the same kind of explicit provision in previous treaties conferring the privilege. The court remarked:

> The expression under the treaty is that they shall be admitted according to the principles of the Constitution; that is, with the consent of Congress, which shall be obtained as soon as possible, and it has been since given. By this construction every

> part is reconciled, and if Congress in their liberality included others who have since settled in the country, they had a right to do so.

An inhabitant in that case is defined to be "one whose domicile is here, and settled here, with an intention to become a citizen of the country."

The import of that case undoubtedly is, in accordance with the natural and reasonable view of the treaty and the laws, that until Congress gave consent the pledge of the treaty, which was expressly to be carried into effect only "as soon as possible," had not been carried out, and that until it was carried out the inhabitants, although residing in territory of the United States and fully subject to protection, were aliens. If the decision had been the other way in the *Laverty* case, the necessary effect would have been to hold the Englishmen involved as alien enemies; and accordingly, in a note to the decision it is said that a considerable number of persons born in the British dominions who had resided in Louisiana under the Territorial government ceased to be considered as British subjects, and as such liable to the restrictions imposed on alien enemies. The treaty made a promise; it did not operate as a collective naturalization; subsequent action by Congress was necessary to effect that result.

In *American Insurance Co.* v. *Canter* (1 Pet., 542) the question involved was as to the validity of an act of the Territorial legislature of Florida.

Considering the relation in which Florida stood to the United States, Chief Justice Marshall said:

> The usage of the world is, if a nation be not entirely subdued, to consider the holding of conquered territory as a mere military occupation until its fate shall be determined at the treaty of peace. If it be ceded by the treaty, the acquisition is confirmed, and the ceded territory becomes a part of the nation to which it is annexed, either on the terms stipulated in the treaty of cession, or on such as its new master shall impose. * * * The same act which transfers their country, transfers the allegiance of those who remain in it; and the law, which may be denominated political, is necessarily changed, although that which regulates the intercourse and general conduct of individuals remains in force until altered by the newly created power of the State.

The general principles upon the subject of alienage are stated as follows by Johnson, J., in *Inglis* v. *Sailors' Snug Harbor* (3 Pet., 99, 155):

> The rule commonly laid down in the books is, that every person who is born within the ligeance of a sovereign is a subject, and, *e converso*, that every person born without such allegiance is an alien. This, however, is little more than a mere definition of terms, and affords no light to guide us in the inquiry * * * what are the facts and circumstances from which the law deduces the conclusion of citizenship or alienage? * * * Two things usually concur to create citizen-

> ship; first, birth locally within the dominions of the sovereign; and secondly, birth within the protection and obedience * * * of the sovereign. * * * The general principle of the common law also is that the allegiance thus due by birth can not be dissolved by any act of the subject. * * * Upon the *cession of a country* it passes to the new sovereign. * * * Upon the conquest of the country it passes by operation of law to the conqueror, who, as sovereign de facto, has a right to the allegiance of all who are subdued by his power and submit to the protection of his his arms.

The case of *Elk* v. *Wilkins* (112 U. S., 94) was an action brought by an Indian, claiming to be an American citizen, against the registrar of a city ward for refusing to register him as a qualified voter. The court (Gray, J.) held that an Indian, born a member of one of the Indian tribes within the United States, is not, merely by reason of his birth in this country, and of his voluntarily separating himself from his tribe, etc., a citizen of the United States. I quote from the opinion of the court, as follows:

> The Indian tribes, being within the territorial limits of the United States, were not, strictly speaking, foreign states; but they were alien nations, distinct political communities. * * * The alien and dependent condition of the members of the Indian tribes could not be put off at their

> own will, without the action or assent of the United States, except under explicit provisions of treaty or statute to that effect. Indians born within the territorial limits of the United States, * * * although in a geographical sense born in the United States, are no more "born in the United States and subject to the jurisdiction thereof," within the meaning of the first section of the fourteenth amendment than the children of subjects of any foreign government born within the domain of that government. * * * Such Indians, then, not being citizens by birth, can only become citizens in the second way mentioned in the fourteenth amendment, by being "naturalized in the United States," by or under some treaty or statute. * * *
>
> The national legislation has tended more and more toward the education and civilization of the Indians, and fitting them to be citizens. But the question whether any Indian tribes, or any members thereof, have become so far advanced in civilization that they should be let out of the state of pupilage, and admitted to the privileges and responsibilities of citizenship, is a question to be decided by the nation whose wards they are and whose citizens they seek to become, and not by each Indian for himself.

The court quotes the following language from an opinion by Judge Deady in a case arising under the statutes forbidding the sale of liquor to Indians (*United States* v. *Osborn*, 2 Fed. Rep., 58):

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> An Indian can not make himself a citizen of the United States without the consent and cooperation of the Government. The fact that he has abandoned his nomadic life or tribal relations and adopted the habits and manners of civilized people may be a good reason why he should be made a citizen of the United States, but does not of itself make him one. To be a citizen of the United States is a political privilege which no one not born to can assume without its consent in some form.

The court also cites an opinion of Attorney-General Cushing (7 Opin., 746) dealing with the status of Indians in relation to citizenship and the preemption of public lands. In that opinion Mr. Cushing classes Indians as "denizens" or "domestic aliens," and states that—

> It is a mistake to suppose that *alien*, as opposed to *citizen*, implies *foreigner*, as respects the country.
>
> The fact, therefore, that Indians are born in the country does not make them citizens of the United States.
>
> The simple truth is plain, that the Indians are the *subjects* of the United States, and therefore are not, in mere right of home birth, citizens of the United States. The two conditions are incompatible. The moment it comes to be seen that the Indians are domestic subjects of this Government, that moment it is clear to the perception that they are not the sovereign constituent ingredients of the Government.

> This distinction between *citizens* proper—that is, the constituent members of the political sovereignty—and *subjects* of that sovereignty, who are not therefore citizens, is recognized in the best authorities of public law. (See Puffendorf, De Jure Naturæ, lib. vii, cap. ii, s.)

In *United States* v. *Wong Kim Ark* (169 U. S., 649), which discusses exhaustively the question of citizenship from the standpoint of birth within the country, the court quotes from Binney on the Alienigenæ of the United States as follows (p. 665):

> The common-law principle of allegiance was the law of all the States at the time of the Revolution and at the adoption of the Constitution; and by that principle the citizens of the United States are, with the exception before mentioned (namely, foreign-born children of citizens, under statutes to be presently referred to), such only as are either born or made so, born within the limits and under the jurisdiction of the United States, or naturalized by the authority of law, either in one of the States before the Constitution, or since that time, by virtue of an act of the Congress of the United States. * * * The right of citizenship * * * is incident to birth in the country, or it is given personally by statute.

The case of *Caignet* v. *Pettit* (2 Dall., 234) is interesting as showing that there may be a class of persons who are not *citizens* of any country.

Plaintiff in that case had been a native of France, residing at Santo Domingo at the time of the French Revolution; but before France became a Republic he came to the United States and took up his residence in Pennsylvania. He had not been naturalized under the statutes, but had been "heard to express his abhorrence of the existing constitution of France; he had never done any act showing his assent to it, and he had declared an intention to settle permanently in America." It was contended that the plaintiff necessarily remained a French citizen; that he was not a citizen of the United States, and that "unless he was a citizen of France he exhibited the extraordinary spectacle of a human being who had no country." The court, holding that he was not a citizen of France, said:

> It is true that he has not acquired the rights of citizenship here, nor, as it appears, in any other country. But whatever may be the inconvenience of that situation, he had an undoubted right to dissent from the revolution, and * * * to refuse allegiance to the new Government and withdraw from the territory of France. Everything that could be said or done to manifest such a determination has been said and done by the plaintiff, except the act of becoming the subject or citizen of another country.

That unfortunate individual was without country simply because he had legally abandoned one country and had not yet attached himself to

another; he had not yet even become a "national," much less a citizen. Here, by the operation of various laws, these people have become nationals, clearly not citizens. There is no such painful incongruity, and we are not subject to the obnoxious imputation of claiming that they are people without a country. Nevertheless, I repeat that they have not left their alienage by birth so far and so fully that they may be held to escape our alien prohibitions.

If authorities in international law are examined (e. g. Calvo, Droit Int., t. 2 pp. 124, 125, Halleck, Int. Law, pp. 813, *et. seq.*) I think they show that nothing is predicated of the effect of cession beyond the general change of nationality and the general results of practice under treaties like our early ones. Nothing can be drawn from any of these authorities, I submit, to weaken the Government contentions in the present case.

The following instances show how the attitude of the United States on this question has been applied:

One Gisbert, a native inhabitant of the Philippines, went to Spain and was enrolled by the Spanish military authorities notwithstanding his certificate of registration issued by the United States authorities at Manila, and a certificate by the United States consul-general at Barcelona stating that he was a native inhabitant of the Philippines and under the protection of the United States. The case was brought to the attention of

the Spanish Government by our minister, who pointed out that while Gisbert could *only* be regarded as a *native inhabitant* under the protection of the United States, he could not, in view of the treaty, be regarded as a subject of Spain liable for military service. Whereupon the Spanish authorities exempted him. (Foreign Relations, 1902, pp. 949–954.)

A Chinese merchant, long domiciled in the Philippines, who married a native of the Philippines in 1899 and had issue, a son, born there in 1902, went with his family on a temporary visit to China and applied to be registered in our consulate, or, failing in that, to have his wife and child registered. His object was stated to be to transfer his property to the wife or child so registered, thus putting it under American ownership and avoiding certain Chinese tax exactions bearing heavily on nonresidents. The Acting Secretary of State disposes of the case by holding that while the particular Chinese person comes within the language of the statute "inhabitants of the Philippine Islands," he is not included within the description "who were Spanish subjects on the 11th day of April, 1899." It was not shown that during his domicile there Spanish citizenship had, in fact, been acquired. That under the rule that the nationality of the wife follows that of the husband, she became a Chinese subject; and that the son is not a *citizen of the Philippine Islands* within the meaning of the statute, as that applies

only to children of inhabitants of the islands who were Spanish subjects on April 11, 1899. (Letter from Mr. Adee to United States consul at Amoy, of September 15, 1903.)

In another case, that of *Mercado*, a native of Porto Rico, resident, however, in Venezuela for fourteen years, who desired the intervention of this Government in a claim against the Government of Venezuela, it was held that he was not an inhabitant of Porto Rico at the time of its cession, and was not a citizen of Porto Rico within the definition of the law, and that he was not entitled to the protection of the United States. (Mr. Adee to Mr. Loomis, August 10, 1901; Manuscript Instructions to Venezuela.)

On the other hand, in the case of *Marrero*, a native of Porto Rico, resident in Chile since 1884, who proposed, however, in 1901 to return to Porto Rico to perform his duties as a citizen there, it was held that the language of section 7 of the Porto Rican act was to be construed in its general legal sense in which continued personal presence is not necessary to constitute continuous residence; and that a native of Porto Rico who makes it his permanent domicile does not therefore lose the benefits of the law because he was temporarily residing elsewhere when it went into effect. (Foreign Relations, 1901, p. 32.)

These instances, of course, express only the executive construction and practice regarding the law, but I submit that they manifest an intent to

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follow its letter and spirit, and that these applications of the law bring into relief the reasonable and natural meaning of the language. In these concrete instances the executive authorities did, in fact, apply the law correctly, and the just inferences from these cases show that local citizenship only has been conferred, along with protection derived from the allegiance, and that beyond such point the previous alien status is not as yet qualified.

Article XI of the Spanish treaty provides that Spaniards residing in the territories shall be subject to the jurisdiction of the courts of the country, and shall have the right to appear and pursue the same course therein as citizens of the country to which the courts belong, not as citizens of the United States.

IV.

THE RECENT INSULAR CASES.

We come now to the arguments and the decisions in the insular cases so far as they touched the present question.

Those cases anticipated this question in an illustrative way rather than as indicating settlement.

In discussing the effects of cession upon the question of citizenship, it was argued by the learned counsel who appeared in this case that the word "citizen" has two meanings, designating, first, "the persons exercising political rights and members of the ruling body politic,"

and, second, "the whole people of any nation without regard to the form of government," in the latter sense meaning simply "subject to the allegiance." (182 U. S., 70.)

The argument there and here touches upon the test by birth. The citizen is one who must not only be born within the territorial limits, but subject to the jurisdiction.

In order to avoid the ambiguity due to this dual sense, the Germans and French make use of the word "nationals" to denote all persons subject to the allegiance of the State; and counsel contended that, "generally speaking, therefore, nationals and aliens would include every person within a given territory, and would indicate the legal relations which they hold to the public authority of such territory."

It is said, then, that "nationals" are divided into two classes—those who possess political rights and those who do not. The latter class includes women, minors, and persons who, for a variety of reasons other than alienage, do not possess such rights. (*Minor* v. *Happersett*, 21 Wall., 162.)

It is argued that the fourteenth amendment, declaring that "all persons born or naturalized in the United States and subject to their allegiance are citizens," uses the word in the sense of "national" or "subject."

"Subject and citizen are, in a degree, convertible terms as applied to natives; and though the term citizen seems to be appropriate to republican

freemen, yet we are, equally with the inhabitants of all other countries, subjects, or we are equally bound by allegiance and subjection to the government and law of the land." 2 Kent Com., 258, note. (Quoted from the opinion of Mr. Justice Curtis in the Dred Scott case by Mr. Justice Gray, speaking for the court, in the case of Wong Kim Ark, 169 U. S.)

It is to be observed, as shown in the argument which we are now discussing, that in the colloquies between the American and Spanish commissioners of the terms of the treaty. the Spanish commissioners contended for the full consideration of citizenship rights, in accordance with modern treaties of territorial cession (like the Louisiana and Florida treaties). The American commissioners pointed out the allowance to *Spanish subjects, natives of Spain*, stating:

> As to natives, their status and civil rights are left to Congress, which will enact laws to govern the ceded territory. This is no more than the assertion of the right of the governing power to control these important relations to the new Government.

And thereupon the American commissioners emphasized the historical liberty of Congress as to the rights of residents within its domain. (Annex 1 to protocol No. 22, treaty of peace between the United States and Spain.)

The commissioners evidently did not mean that Congress was empowered to govern dependents in

any unconstitutional or obnoxious sense. But it is likewise perfectly clear that the commissioners intended to keep natives or residents out of the citizenship category, or out of any approximate category, *quoad* the relations to this country, until Congress should enact otherwise.

The opposing argument contends in effect that the dismemberment of populated territory from a State on the one hand, and its incorporation into a new nationality on the other, operate as a collective naturalization *ipso facto*. (182 U. S., 77.) But *incorporation* is just what this treaty avoided, and if the authorities do not use the word in that sense, then by collective naturalization they merely indicate the general change of nationality.

Indeed, if counsel used these words with any strict meaning, then they simply intended to say that by the acquisitions of these island territories we have naturalized the inhabitants and they have become citizens, notwithstanding the precautions against that result.

Collective naturalization by the force of a treaty must necessarily mean the force which grants, and not the force which withholds. If a treaty were silent on the subject, the argument would be against the grant, because our own precedents clearly require an explicit affirmative provision.

I am not really required in this case to deal with the question whether the fourteenth amendment does in fact settle the status of persons born in these island territories since the cession, and therefore I

do not discuss that question. But the amendment clearly says that "all persons *born* or *naturalized in the United States*, and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside." And Mr. Justice Curtis, in his dissenting opinion, in the Dred Scott case, states that, in his view, under the Constitution, every person *born on the soil of a State*, and who is a citizen of that *State*, by force of its Constitution or laws, is also a citizen of the United States.

I entirely agree with the proposition previously laid down by counsel, viz:

> What rights human beings owing direct and immediate obedience to the sovereign in whose jurisdiction they may reside are to possess is a question for that sovereign to determine in a constitution or by legislation, but subjection or nationality merely express a relation of fact, to wit, allegiance and protection. (182 U. S., 84.)

This is all the claim of nationality here means, and the sovereign has determined by a treaty and by legislation what rights for the time being are possessed, and the particular rights set up here are not included. I do not, of course, agree with the conclusions drawn from that proposition by counsel, namely, that the inhabitants of Porto Rico born subsequent to the cession, and not under a direct immediate allegiance to any foreign nation, are citizens of the United States, and as such possess "whatever rights are generally conferred upon

that class by law." In this passage by the words "that class," obviously counsel means *citizens*.

When the reservation was incorporated in the stipulations by the negotiators of the treaty, and when the following laws retained it, emphasizing the fact that no grant has yet been made which merges the identity of the previous foreigner into that of a member of the people of the United States, evidently Congress was of opinion in enacting the more recent laws that the act of 1893 applied to these peoples until its ban against them was explicitly removed. The previous foreigner has now come under the sovereignty of the United States; that is the dominant and general allegiance; it involves a corresponding right of protection. He is also a member of the people of Porto Rico, or of the Philippine Islands, as the case may be, and thus belongs fully to the local body politic. He is not yet a member of our domestic body politic; further right has been withheld, and the partial change in his status from the previous wholly foreign status has not conferred upon him automatically this or that particular right not expressed in any grant by which citizens have been distinguished from conceded aliens.

The treaty and laws register the various events by which the absolute foreign status has been measurably qualified. It will doubtless be contended that a specific and explicit prohibition by a law subsequent to the acquisition of Porto

Rico and the Philippines was necessary; that Congress, by not expressly including "native inhabitants" in the alien prohibitions, must be assumed to have intended to admit them, no matter what their defects under the classification of alien disabilities. But there was a previous bar, and an express reservation of any change in status. This argument seems to me plainly unreasonable, in view of the well-known attitude and policy of Congress regarding the entire subject of immigration. When we look at the matter as a question purely of intention, of conscious and continuing understanding by Congress of what the laws before us—the treaty, the Porto Rican and Philippine government acts, the immigration laws enacted previous to the Spanish war, and the codifying act of 1903—sought and meant when read together, there can be no real question that the construction by Congress excludes; that is surely the legislative construction. Under the events and enactments presented, Congress manifestly thought that no further specific prohibition was necessary to bar, but that, on the contrary, an additional explicit allowance is necessary to admit. The proposition by no means is "Once a foreigner, always a foreigner, although our Government rules and protects and our flag flies as a symbol of sovereignty in the new possessions." The proposition simply is, "Once a foreigner, native and resident in lands beyond the seas, still a

foreigner as to certain civil rights, local and peculiar to the home territory and status, including this particular civil right, until Congress declares and provides otherwise."

As to Mr. Coudert's additional arguments contained in his brief in the present case, they do not differ materially from his previous argument as to "native inhabitants" presented in the De Lima and Downes cases. I have already gone over that ground.

The learned resident commissioner from Porto Rico, in a brief filed by him as *amicus curiae* under leave of court, naturally and earnestly contends for the larger proposition that "native inhabitants are now citizens of the United States," pointing out, indeed, the different aspect of the question shown by the view that it is not a *native* of Porto Rico, but a *citizen* of Porto Rico who is claimed to be a citizen of the United States. That, however, begs the question. It is of course conceded that those native inhabitants who have come under the allegiance and protection of the United States are citizens of Porto Rico; but our contentions are that, although citizens of Porto Rico, they are not citizens of the United States, and are to be regarded as aliens under the immigration laws until Congress determines otherwise.

The learned commissioner also contends that the aliens excluded by the law must have come from a foreign port, because the act of August 3, 1882, one of the acts "to regulate immigration,"

imposed a duty of 50 cents for every passenger not a citizen of the United States who shall come by vessel from a foreign port (22 Stat., 214). Another act upon the subject, entitled "An act to regulate the carriage of passengers by sea" (August 2, 1882; 22 Stat., 186), protects "emigrant passengers" who have embarked at any port or place in a foreign country or dominion, except those in contiguous foreign territory. The full stress of the decision in *De Lima* v. *Bidwell*, and of certain executive rulings which are cited—one expressly relating to the act of August 3, 1882—can not thus be imposed upon the present case, because the immigration law with which the court is now concerned does not contain the words in question, and those words can not be drawn into that law, since the particular subsidiary acts are in reality one a "passenger act" for the protection of emigrants, rather than an immigration-exclusion law at all, and the other a law levying a head tax upon a particular narrower class of noncitizens in order to create an immigrant fund to be used for the benefit and relief of such noncitizens. Since the immigrants to be cared for and relieved are "immigrants arriving in the United States," I do not undertake to argue that Congress (not foreseeing the present situation) did not then regard the two classes as identical, and contemplate in general that every alien immigrant passenger arriving would come from a foreign port. But I do say that this feature of such laws can not justly

be carried into the particular law which we are discussing.

The learned gentleman gives an interesting résumé of the status of Porto Rico and its inhabitants under the Spanish Crown, previous to the transfer of sovereignty, and argues that there was a complete change of this status, first under the military government of the United States, next under the provisions of the treaty. He suggests that by the treaty Spain did not abandon her sovereignty nor even relinquish it, but simply confirmed the transfer of sovereignty already accomplished under the military government, and agreed to by a former diplomatic transaction. (Message of the Spanish Government: Foreign Relations, 1898, pp. 823, 824.)

Señor Degetau goes on to contend from the diplomatic negotiations and the exchanges of the respective commissioners that the words "native inhabitants" as employed by the treaty merely intended to describe the uncivilized tribes of the Philippine Islands, and did not include Spanish citizens born in Porto Rico. But, as he indicated that the designation of uncivilized tribes was only the primary intention in the use of the phrase "native inhabitants," I presume we may conclude that ultimately the intention embraced also the Spanish citizens of Porto Rico.

The perplexing dilemma referred to by Señor Degetau on page 33 of his brief is, of course, the

very one before the court, and the dilemma is resolved when we say that these people are American in nationality and citizens of their islands, but not of American citizenship; that, although now Americans internationally, they retain their former alienage in large degree, and are excluded under the imigration laws by the effect of the treaty and statute reservations until Congress affirmatively removes the ban of those laws respecting them.

The learned gentleman's appearance here under the privilege of admission to this court, accorded to him because the court, I suppose (with deference), saw no reason why he could not be permitted to take the requisite oath of allegiance, commands respect because of the earnestness and ability with which he has presented the case of the island people whom he represents. It would be in high degree improper and untrue to describe this gentleman standing here as an alien. As he suggests by his closing statements of the incongruities involved, it would not be accurate or just to describe in general and unqualifiedly the native inhabitants, the citizens of Porto Rico, as aliens. But these incongruities are apparent rather than real. They do not in fact exist. And "American" as these peoples are, in the broad international sense, and citizens of their native islands, nevertheless those who are afflicted (I trust, few in number) with the defects and disabilities specified in the immigration laws are to be treated as aliens under those laws.

But the language quoted (p. 29) from a memorandum of the American commissioners seems plainly to indicate that the words "native inhabitants" were intended to include all inhabitants of the islands other than those "Spanish subjects, natives of Spain," who should elect to preserve their allegiance to Spain. (Annex 1 to Protocol 22, S. Doc. 62, 55th Cong., 3d sess., pp. 261–262.)

To take up now the recent insular decisions:

Mr. Justice Brown, in announcing the conclusion and judgment of the court in *Downes* v. *Bidwell*, points out the distinction between the Thirteenth amendment, prohibiting slavery not only within the United States but also "in any place subject to their jurisdiction," and the Fourteenth amendment, which limits citizenship to persons born or naturalized in the United States, etc., and does not extend to those born in any place "subject to their jurisdiction."

That opinion thus refers to the treaty stipulations respecting the inhabitants under the Louisiana purchase:

> This evidently committed the Government to the ultimate, but not to the immediate, admission of Louisiana as a State, and postponed its incorporation into the Union to the pleasure of Congress. (*Downs* v. *Bidwell*, 182 U. S., 252.)

Mr. Justice White says on this point (p. 333):

> * * * it indubitably results * * * third, that the opinion which prevailed was

that, although the treaty might stipulate for incorporation and citizenship under the Constitution, such agreements by the treaty-making power were but promises depending for their fulfillment on the future action of Congress. In accordance with this view the territory acquired by the Louisiana purchase was governed as a mere dependency, until, conformably to the suggestion of Mr. Jefferson, it was by the action of Congress incorporated as a Territory into the United States and the same rights were conferred in the same mode by which other Territories had previously been incorporated; that is, by bestowing the privileges of citizenship and the rights and immunities which pertained to the Northwest Territory.

* * * * *

Mark the language. It expresses a promise: "The inhabitants of the ceded territory *shall be incorporated into the Union of the United States*." Observe how guardedly the fulfillment of this pledge is postponed until its accomplishment is made possible by the will of the American people, since it is to be executed only "as soon as possible under the principles of the Federal Constitution." If the view now urged be true, this wise circumspection is unnecessary, and, indeed, as I have previously said, the entire proviso was superfluous, since everything which it assured for the future was immediately and unalterably to arise (p. 325).

The case was precisely the same under the Spanish treaty of 1819.

Noting the recent Hawaiian case as touched upon by Mr. Justice Brown, it may be said that the annexation resolution (30 Stat., 750) was silent on the subject of the admission of native Hawaiians into this country, establishing a rule only as to the Chinese residents there; while the organic law (31 Stat., 141, 161) set the point at rest practically by making the citizens of the former republic of Hawaii citizens of the United States, and by establishing definitely the particular exclusion of the Chinese aliens resident there.

Again, *per* Mr. Justice Brown, the court says (*Downes* v. *Bidwell*, 182 U. S., 279–280):

> We are also of opinion that the power to acquire territory by treaty implies not only the power to govern such territory, but to prescribe upon what terms the United States will receive its inhabitants, and what their status shall be in what Chief Justice Marshall termed the "American Empire." There seems to be no middle ground between this position and the doctrine that if their inhabitants do not become, immediately upon annexation, citizens of the United States, their children thereafter born, whether savages or civilized, are such, and entitled to all the rights, privileges, and immunities of citizens. If such be their status, the consequences will be extremely serious. Indeed, it is doubtful if Congress would ever assent to the annexation of territory upon the condition that its inhabitants, however foreign they may be to our habits, tradi-

tions and modes of life, shall become at once citizens of the United States. In all its treaties hitherto the treaty-making power has made special provision for this subject; in the cases of Louisiana and Florida, by stipulating that "the inhabitants shall be incorporated into the Union of the United States and admitted as soon as possible * * * to the enjoyment of all the rights, advantages, and immunities of citizens of the United States;" in the case of Mexico, that they should "be incorporated into the Union, and be admitted at the proper time (to be judged of by the Congress of the United States) to the enjoyment of all the rights of citizens of the United States;" in the case of Alaska, that the inhabitants who remained three years, "with the exception of uncivilized native tribes, shall be admitted to the enjoyment of all the rights," etc., and in the case of Porto Rico and the Philippines, "that the civil rights and political status of the native inhabitants * * * shall be determined by Congress." In all these cases there is an implied denial of the right of the inhabitants to American citizenship until Congress by further action shall signify its assent thereto.

Again, at page 282 in *Downes* v. *Bidwell:*

It is obvious that in the annexation of outlying and distant possessions grave questions will arise from differences of race, habits, laws, and customs of the people, and

from differences of soil, climate, and production, which may require action on the part of Congress that would be quite unnecessary in the annexation of contiguous territory inhabited only by people of the same race or by scattered bodies of native Indians.

We suggest, without intending to decide, that there may be a distinction between certain natural rights, enforced in the Constitution by prohibitions against interference with them, and what may be termed artificial or remedial rights which are peculiar to our own system of jurisprudence. * * * Of the latter class are the rights to citizenship, to suffrage [citing *Minor* v. *Happersett*, 21 Wall., 162], and to the particular methods of procedure pointed out in the Constitution, which are peculiar to Anglo-Saxon jurisprudence, and some of which have already been held by the States to be unnecessary to the proper protection of individuals.

Whatever may be finally decided by the American people as to the status of these islands and their inhabitants—whether they shall be introduced into the sisterhood of States, or be permitted to form independent governments—it does not follow that in the meantime, awaiting that decision, the people are, in the matter of personal rights, unprotected by the provisions of our Constitution and subject to the merely arbitrary control of Congress. Even if regarded as aliens, they are entitled under the princi-

> ples of the Constitution to be protected in life, liberty, and property. This has been frequently held by this court in respect to the Chinese, even when aliens, not possessed of the political rights of citizens of the United States [citing various authorities].

Per Mr. Justice White, concurring in the *Downes* v. *Bidwell* judgment (182 U. S., pp. 312–313):

> It seems to me impossible to conceive that the treaty-making power, by a mere cession, can incorporate an alien people into the United States without the express or implied approval of Congress. * * * If the proposition be true [that the treaty-making power can absolutely incorporate territory, but may not insert conditions against incorporation], then millions of inhabitants of alien territory, if acquired by treaty, can without the desire or consent of the people of the United States, speaking through Congress, be immediately and irrevocably incorporated into the United States, and the whole structure of the Government be overthrown.

Here, again, the argument is directed against complete incorporation and absolute citizenship. But the argument applies to the consequence, less revolutionary but nevertheless impossible to grant, of such an approach to citizenship as assures unrestricted entry into this country.

These expressions show forcibly what would be the result of standing on an uncompromising view

of the word "alien." The immediate and irrevocable incorporation referred to of millions of inhabitants of alien territory would present many aspects affecting personal and property rights and various governmental relations. It would be accomplished *pro tanto* up to the measure of granting substantial rights of citizenship by the construction that these millions of inhabitants were at least so far incorporated as to permit their unrestricted entry into this country. The learned justice proceeds to show the extent and effect of the argument of immediate and irrevocable incorporation as follows (id., pp. 313–314, 315):

> And the consequent result—incorporation—would be beyond all future control of or remedy by the American people, since at once, and without hope of redress or power of change, incorporation by the treaty would have been brought about. The inconsistency of the position is at once manifest. The basis of the argument is that the treaty must be considered to have incorporated, because acquisition presupposes the exercise of judgment as to fitness for immediate incorporation. But the deduction drawn is, although the judgment exercised is against immediate incorporation, and this result is plainly expressed, the conditions are void because no judgment against incorporation can be called into play. * * * If the treaty with Spain incorporated all the territory ceded into the United States, it resulted that the millions of people to whom

> that treaty related were, without the consent of the American people as expressed by Congress and without any hope of relief, indissolubly made a part of our common country.

Again, *per* Mr. Justice White (id., pp. 333–334):

> Whilst drafted in accordance with the precedent afforded by the treaty ceding Louisiana, the Florida treaty was slightly modified in its phraseology, probably to meet the view that under the Constitution Congress had the right to determine the time when incorporation was to arise. Acting under the precedent afforded by the Louisiana case, Congress adopted a plan of government which was wholly inconsistent with the theory that the territory had been incorporated. * * * It will serve no useful purpose to go through the gradations of legislation adopted as to Florida. Suffice it to say that in 1822 (3 Stat., 654, c. 13) an act was passed as in the case of Missouri, and presumably for the same reason, which, whilst not referring to the Northwest Territory ordinance, *in effect endowed the inhabitants of that territory with the rights granted by such ordinance.*

In Mr. Justice Gray's concurring opinion he cites the clause of the treaty relating to the native inhabitants as clearly recognizing the control over acquired territory belonging to the Executive and the legislature.

In the dissenting opinion delivered by the Chief Justice he cites *United States* v. *Percheman* (7 Pet., 87), containing the following passage:

> The people change their allegiance; their relation to their ancient sovereign is dissolved; but their relations to each other and their rights of property remain undisturbed.

The question here is whether, like the rights of property, the alien disabilities remain undisturbed until it has been provided otherwise. That the change in allegiance and sovereignty have not produced this effect seems to be implied or intimated in the following language of the Chief Justice, citing the significant article of the treaty, and not suggesting the acquirement by the native inhabitats, notwithstanding this article, of such rights as are here claimed (182 U. S., pp. 369–370):

> Doubtless the subjects of the former sovereign are brought by the transfer under the protection of the acquiring power, and are so far forth impressed with its nationality, but it does not follow that they necessarily acquire the full status of citizens. * * * This [the treaty reservation as to civil rights] was nothing more than a declaration of the accepted principles of international law applicable to the status of the Spanish subjects and of the native inhabitants. It did not assume that Congress could deprive the inhabitants of ceded territory of rights to which they might be

entitled. The grant by Spain could not enlarge the powers of Congress, nor did it purport to secure from the United States a guaranty of civil or political privileges.

In the first Dooley case Mr. Justice White's dissenting opinion stated the following as one of the propositions which seemed to him to have been theretofore established (*Dooley* v. *United States*, 182 U. S., 222, 237):

> 3. As the treaty with Spain provided "that the civil rights and political status of the native inhabitants should be determined by Congress," in reason this provision should not be controlled by conclusions deduced from treaties made by the United States in the past with other countries which did not contain such a provision, but expressly stipulated to the contrary.

In the *Diamond Rings case*, the Chief Justice, detailing the successive steps of acquisition, thus expresses the view of the court (183 U. S., 151, 179):

> The Philippines thereby ceased in the language of the treaty to be Spanish. Ceasing to be Spanish, they ceased to be a foreign country. They came under the complete and absolute sovereignty and dominion of the United States, and so became territory of the United States over which civil government could be established. The result was the same, although there was no stipulation that the native inhabitants should be incorporated into the body

> politic, and none securing to them the right to choose their nationality. Their allegiance became due to the United States, and they became entitled to its protection.

On the tariff side of the insular controversy it was determined by *De Lima* v. *Bidwell* and *Downes* v. *Bidwell* that when foreign territory has been fully acquired it becomes domestic and appurtenant, and duties may not be collected on goods arriving therefrom under the antecedent general tariff act as upon importations from a *foreign* country; but nevertheless that Congress may by a subsequent statute explicitly impose import duties against insular goods without violating the constitutional rule of uniformity of taxation throughout the United States.

I have endeavored heretofore, in discussing the reasonable limits of insisting upon the logical contents and effect of a mere term, to contend that no such conclusive and exclusive force should be attributed to the word "aliens" in this antecedent law as was given to the word "foreign" in that antecedent law by the De Lima decision. For here we have many special and separate reasons of policy and intent, residing in the nature of the case, for denying that the use of the term prior to the unforeseen events of war and acquisition brings us to a dilemma which can only be solved upon the same absolute and etymological construction of a word. But even if the De Lima decision should be held to extend to the word "aliens" here the

court's doctrine respecting the word "foreign" there, still, under the *Downes case*, we have a clear settlement of the present dispute, because the supreme law, as expressed both in the treaty and the statutes, provided as clearly that the personal alien status should remain unchanged as if the language had been, "Native inhabitants of the insular possessions of the United States shall continue to be subject to the alien immigration laws until otherwise provided." And furthermore, in the present case there is no principle or provision of the Constitution which raises doubt as the uniformity clause did respecting insular tariff taxation.

The opinion of the court in the Hawaiian case of *Mankichi* (190 U. S., 197) shows again that until Congress definitely acts and provides by legislation, certain provisions of the Constitution do not extend to new territory; that there is a hiatus, so to speak, suspending the full determination of rights and obligations and the complete application of principles and methods of government, between the act or instrument of acquisition and the organic law. The decision was in effect that, while the particular constitutional right of trial in criminal prosecutions by common law proceedings through grand and petit juries did not apply from the moment of annexation, most if not all the privileges and immunities contained in the bill of rights of the Constitution were intended to apply from that moment. The two rights alleged to be violated in that case were held not to be

fundamental in their nature, but to concern merely a method of procedure which long use, long practice, and the conditions of the Hawaiian Islands had established and vindicated. Here, I say, there is no fundamental right, and the hiatus between alienage and citizenship has been preserved by positive law.

V.

THE IMPORT OF THE INSULAR DECISIONS IN THIS QUESTION.

I have endeavored as far as possible to quote from the various opinions in the insular cases on this point alone, and to avoid those general principles and other aspects wherein the divergences in those cases sharply appear. Necessarily, however, this question runs somewhat into the other questions; but I think we may justly reach these conclusions respecting the attitude or intimations of the court on the question now presented: That in the view of a majority of the court in *Downes* v. *Bidwell* there was, upon general principles, no incorporation of "native inhabitants" into our body politic; and in view of the express reservation by the treaty, recognized by subsequent legislation, it was and is necessary for Congress to determine what the exact status and rights of these inhabitants shall be.

Notwithstanding the differing reasons for the opinion of the majority of the court in *Downes* v. *Bidwell* and the earnest dissents of the minority from the judgment in that case, I submit that the

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dissents do not suggest any conflict with the argument of the Government in the present case. It is evident, I think, that all the members of the court look to the reservation in the treaty and the laws on the subject of civil status, have in view the clear intention and authoritative effect of these particular reservations, and because of the reservation, if not on general grounds, intimate that citizenship at least has not been conferred, and do not in the least intimate that, beyond the obvious shifting of allegiance and protection, beyond the impressing of the new nationality, "so far forth," as the Chief Justice says—that is, as brought "by transfer under the acquiring power"—any particular changes or enlargements of rights of the alien status have yet been acquired or conferred.

VI.

THE HISTORY AND PURPOSE OF THE IMMIGRATION LAWS.

I take up now this branch of the topic in order to show the field on which the will of Congress operates, the will of the nation as expressed in its laws, the policy and purpose to be subserved by the exclusion of certain aliens, and the meaning or bearing, therefore, of the reservation in the treaty and the law involved, by which "native inhabitants" were left in the alien status for the present.

By acts now embraced in section 2158 et seq., Revised Statutes, the "involuntary immigration" of "coolies," being "the subjects of China, Japan,

or any other oriental country," was prohibited, but voluntary immigration (or emigration) of such persons was not restricted. The purpose of this law manifestly was protective to unfortunate aliens likely to be held to service or labor. The old idea of a free asylum for all peoples had not been qualified; the reasons for limitation in the national interest had not yet begun to press.

By the act of March 3, 1875 (18 Stat., 477), this new purpose appears first in connection with the law relating to coolies; the immoral purpose appearing in such involuntary immigration is recognized, and the law forbids that branch of the "coolie trade," and the importation of women in general (that is, without respect to oriental origin) for immoral purposes; and the admission of "convicts," as described in section 5 of that law, is prohibited. This was the beginning of the forbidden or excluded classes.

By acts of August 3, 1882 (22 Stat., 214), of February 26, 1885 (23 Stat., 332), February 23, 1887 (24 Stat., 414), and October 19, 1888 (25 Stat., 565), provision was made for the return of forbidden immigrants, the importation of alien contract labor was prohibited, and various stringent rules were made for the enforcement of the law.

Pari passu with these statutes the body of Chinese-exclusion laws was enacted and developed.

By the act of March 3, 1891 (26 Stat., 1084), the inadmissible classes were enlarged to include mental and physical defects and indigency. As

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that law is the one before the court, I repeat here that category precisely, viz:

> All idiots, insane persons, paupers or persons likely to become a public charge, persons suffering from a loathsome or a dangerous contagious disease, persons who have been convicted of a felony or other infamous crime or misdemeanor involving moral turpitude, polygamists, and also any person whose ticket or passage is paid for with the money of another or who is assisted by others to come, unless it is affirmatively and satisfactorily shown on special inquiry that such person does not belong to one of the foregoing excluded classes, or to the class of contract laborers excluded by the act of February 26, 1885. * * *

The act of March 3, 1893 (27 Stat., 569), made or authorized certain regulations as to shipment of alien immigrants from abroad, as to the liabilities of vessel owners and masters, and as to classification for purposes of manifesting, etc. Other Chinese-exclusion statutes were passed in this interval. And finally, by section 2 of the codifying act of March 3, 1903 (32 Stat., 1213), the excluded classes are further enlarged to include other degrees or kinds of defectives (e. g., "epileptics," "anarchists"), and the list is explicitly reenumerated.

Now, it is manifest that Congress, reflecting the convictions of the country, found it necessary for our welfare to exclude these dangerous or burdensome classes of foreigners. It is evident that from

the point of view of our civilization and well-being the perils aimed at, or some of them, would proceed especially from oriental and tropical countries as well as from certain other parts of the world remote in space, culture, or race ideals from our own country. For it is matter of common knowledge that in the Orient and the Tropics, as a rule, unfavorable climatic conditions, overcrowding of population, primitive notions and methods in hygiene, different (and, to our conceptions, low) standards of living and moral conduct, extreme and willing indigency, all combine to produce in most marked degree many of the very evils at which the law was aimed.

We find that the court has sustained in the broadest terms the sovereign right of the nation to exclude aliens, the authority of Congress to enact such laws to carry into effect this sovereign right and the national will and policy, and has noted the purpose and motive of the laws.

In the case of *Nishimura Ekiu* v. *United States* (142 U. S., 651), involving the right to admission into the United States of a Japanese person, Mr. Justice Gray, delivering the opinion of the court, said (p. 659):

> It is an accepted maxim of international law that every sovereign nation has the power, as inherent in sovereignty and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and

upon such conditions as it may see fit to prescribe. * * * In the United States this power is vested in the National Government. * * * It belongs to the political department of the Government, and may be exercised * * * through statutes enacted by Congress. * * *

In *Holy Trinity Church* v. *United States* (143 U. S., 457), the court, by Mr. Justice Brewer, referring to the situation which called for the alien contract labor law of February 26, 1885, quotes from the opinion of Mr. Justice Brown as district judge in the case of *United States* v. *Craig* (26 Fed. Rep., 795, 798).

In the *Japanese Immigrant case* (189 U. S., 86), which involved the right to exclude a Japanese person as a pauper, under the immigration act of March 3, 1891, the court, by Mr. Justice Harlan, says (p. 97):

> A statute excluding paupers or persons likely to become a public charge is manifestly one of police and public security. * * * The constitutionality of the legislation in question, in its general aspects, is no longer open to discussion in this court. That Congress may exclude aliens of a particular race from the United States; prescribe the terms and conditions upon which certain classes of aliens may come to this country; establish regulations for sending out of the country such aliens as come here in violation of law; and commit the enforcement of such provisions,

> conditions, and regulations exclusively to executive officers, without judicial intervention, are principles firmly established by the decisions of this court [citing *Ekiu* v. *United States*, 142 U. S., 651; *Fong Yue Ting* v. *United States*, 149 U. S., 698; *Lem Moon Sing* v. *United States*, 158 U. S., 538; *Wong Wing* v. *United States*, 163 U. S., 228; *Fok Yung Yo* v. *United States*, 185 U. S., 296, 305].

I submit that the underlying reason and necessity of all such laws require that this bar against "native inhabitants" should be maintained until Congress has had full opportunity and has deliberately determined their *status;* that the question should not be improvidently settled on dialectics and scholastic insistence on the word "alien," in the face of reservations, the intention and just effect of which are, I think, apparent, viz, to connect our new tropical possessions with the existing exclusions. It certainly seems to me that the treaty-making power and Congress had in mind the very oriental and tropical dangers to which I have alluded. Shall the broad design be ignored because there is a hiatus in explicit and clinching statement, *eo nomine* applying the immigration laws, or shall the brief general expression used, by reason of the lack of comprehensive details, be regarded as inartificial and insufficient to preserve the *status quo ante?*

We have done and are doing great things for these peoples, mainly at our cost rather than their

own. We are conferring on them inestimable boons, as will some day be recogniz d cordially by them and all the rest of the world. We freed them from tyrannical foreign government, and the corrupt, selfish, or absolutist designs of their own insurgent chiefs. For these ends, most of all, we gave our own blood and treasure, not as a rhetorical and insincere phrase, but in sober fact. If national sovereignty and dignity also urged this course, and general gains to civilization concurred, that does not make the sacrifices for the island localities any the less. We do not ignore the manhood and rights of the native inhabitants in their own islands—our appurtenant territorial possessions—or in the United States, or in the rest of the world wherein we stand for their protection and secure development. We have shown and are showing that we give them autonomy as fully and as promptly as is possible for them and us and the rest of the world. It can not be doubted under the language of the treaty and the law that we will settle their status in due time (and in prompt time if our national character and our actions toward them heretofore are to be trusted), and fairly and, indeed, generously. In the meantime can we not leave them, and have we not left them by the existing law, in the civil situation respecting ourselves which they occupied before the Spanish war and the treaty of peace? Are they not still "aliens" within the meaning and exclusions of

the law in question, although their alienage has been slightly qualified, by the effect of events rather than by the result of substantive law? Can we not look over the ground deliberately and study this vast and complex problem, pregnant with consequences to our welfare as well as theirs? Has the strict and technical meaning of a word opened a door which we thought had been securely closed until Congress should open it?

I am very confident that these questions must be answered so as to sustain the Government contention and that the court will so declare. And I respectfully submit, therefore, that the order below should be affirmed and the petitioner be remanded for deportation.

HENRY M. HOYT,
Solicitor-General.

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JAMES H. McKENNEY,
Clerk.

In the Supreme Court of the United States.

OCTOBER TERM, 1903.

ISABELLA GONZALEZ, APPELLANT,
v.
WILLIAM WILLIAMS, UNITED STATES commissioner of immigration at the port of New York. } No. 225.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

SUPPLEMENTAL BRIEF FOR THE UNITED STATES WITH ESPECIAL REFERENCE TO JURISDICTION.

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I know that this court scrutinizes with care any and every argument addressed to it, and no particular request to do so is necessary. But as points were raised at the hearing which have demanded an especially careful study and reflection by counsel, I request the court to consider the arguments here formulated as the final and emphatic statement of the Government's position on the entire case, and I ask the court to weigh these arguments accordingly.

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I.

JURISDICTION.

The question was suggested from the bench on the hearing whether the jurisdiction to determine the petitioner's status is not exclusive and final in the executive authority under the act of August 18, 1894.

Counsel on both sides assumed, it seems, too hastily, that the executive jurisdiction could not be regarded as exclusive and final when the challenge of the case is that the woman is not an alien at all. The position of opposing counsel is that the executive authority does not attach and retain its hold as exclusive and final unless alienage is conceded; that otherwise a native-born American citizen, on arriving from abroad, might be deported under an arbitrary exercise of the executive power without any recourse whatever.

In stating my concurrence with opposing counsel so far as to incline to the view that under all the circumstances of this case, and with the denial at the threshold of any alien character whatever, it was a proper case for the courts, I did not intend to concede the point. In any event, being jurisdictional, no concession could withdraw it from the court, and being presented now from the bench for deliberate examination, I submit the authorities which tend to show that notwithstanding the nature of the question and the denial of

alienage, the determination of the point belongs to the executive and not the judicial authority.

The statute provides (act of August 18, 1894, 28 Stat., 390):

> In every case where an alien is excluded from admission into the United States under any law or treaty now existing or hereafter made, the decision of the appropriate immigration or customs officers, if adverse to the admission of such alien, shall be final unless reversed on appeal to the Secretary of the Treasury.

No appeal appears to have been taken in this case, and, obviously, the first contention to be made is that even if the woman were ultimately entitled to habeas corpus she was not in a position justly to obtain the writ until she had prosecuted an unavailing appeal to the Secretary of the Treasury, and thus pursued her remedy in the executive course to the uttermost. At the most, the executive jurisdiction when fully invoked and pursued may be voidable, but is not void *ab initio*.

It was stated from the bench, and by the member of the court who delivered its opinion in the *Lem Moon Sing* case (158 U. S., 538), which affected a Chinese merchant having a permanent domicile in the United States, that the same argument was suggested there as herein, viz, the possibility of the deportation of a native-born citizen of the United States, but that this argument of a possible abuse of power did not affect the decision in that

case. I suppose the plea of possible abuse of power, of an unwarranted or outrageous use, was made in the argument of all such cases. It was certainly made in the *Japanese Immigrant Case* (189 U. S., 86), and yet the court therein sustained the executive action as manifesting due process and the executive jurisdiction as exclusive. It is pertinent to quote the following sentences from the opinion of the court (p. 101):

> An act of Congress must be taken to be Constitutional unless the contrary plainly and palpably appears. The words here used do not require an interpretation that would invest executive or administrative officers with the absolute arbitrary power implied in the contention of the appellant.

This language repels the argument based upon the possibility of an abuse of power, either that which would deny due process in the case of a conceded alien, as well as that which might deport as an alien a native-born citizen. Of course that opinion related to one whose alien character could not be disputed. The just reasons for excluding those who come within the intention and terms of the law are strikingly shown by the *quære* of the opinion, which, noting the existing treaty with Japan, with its express exception, respecting liberty of entry, of any regulation relating to police and public security, questions whether, even in the absence of such a provision in the treaty the clause

granting "full liberty to enter, reside," etc., refers to that class in either country who from habits or conditions are the object of police regulations designed to protect the general public against contact with dangerous or improper persons.

The cases heretofore mentioned and others like them (e. g., the *Nishimura Ekiu* case, 142 U. S., 651) related to admitted aliens. The case last cited arose under the immigration law now before the court, which contained a provision for finality of decision by the executive officer similar to that in the act of 1894. The only difference between the two laws appears to be that the act of 1894 covers the case of every alien, including Chinese, whereas the provision of the act of 1891 from its context is restricted to the exclusion of other aliens because of the disabilities specified in that act.

In the case of *Nishimura Ekiu* it was said by the court that—

> An alien immigrant prevented from landing by any such officer [customs or immigration officers] claiming authority to do so under an act of Congress, and thereby restrained of his liberty, is doubtless entitled to a writ of habeas corpus to ascertain whether the restraint is lawful.

The opinion, after stating that a statute may make an executive officer the sole and exclusive judge of the existence of the relevant facts, and

no other tribunal unless expressly authorized by law to do so is at liberty to reexamine or controvert the sufficiency of the evidence on which he acted, held that the particular decision was within the authority conferred upon the inspector of immigration by the act of 1891, and as no appeal was taken to the superintendent of immigration, that decision against the petitioner's right to land in the United States was final and conclusive.

In the *Lem Moon Sing* case one claim was that the alien was entitled of right under some law or treaty to enter the United States, and therefore in excluding him the immigration officers exceeded their jurisdiction, and, a judicial question being thus presented, the courts might intervene. But it was held that under such interpretation of the act of 1894 the provision that the decision of the appropriate immigration or customs officer should be final unless reversed on appeal to the Secretary of the Treasury would be of no practical value. This may also be true as to *any* claim of right, not only a claim under a law or treaty in behalf of an alien, but also a claim, as here, that under the treaty and under general public law affecting the interpretation of the treaty, the petitioner is not an alien at all. Under such claim also the finality provision of the act of 1894 would be of no practi-

value. From both the *Lem Moon Sing* case and the Japanese *Nishimura Ekin* case it is evident that the failure to appeal to the Secretary of the

Treasury from the decision of the subordinate officer leaves that decision final and conclusive.

In the case of Chin Bak Kan the aliens claimed citizenship on mere assertion not established by proof, but the question of the *executive* authority to determine finally and conclusively without judicial intervention was not presented. The case came up on appeal from a judgment of a district court affirming an order of deportation by a United States commissioner. Nevertheless the language of the court clearly tends to sustain the view that the question of alienage is not necessarily withdrawn from the immigration authorities at the frontier by simply asserting the claim of birth within the country. The jurisdiction of a commissioner in Chinese cases does not differ greatly from that of the executive officers in alien immigration cases in general. The authority is *quasi*-judicial in each case. A right of conclusive determination, subject to a particular express appeal, is given in each case—in one case to the district court, in the other to the Secretary of the Treasury. And the court held in *Chin Bak Kan's* case that it is competent for Congress to empower a United States commissioner to determine the various facts on which citizenship depends in Chinese cases, under the *Wong Kim Ark* decision, and under the law which requires a Chinese person to establish by affirmative proof and to the satisfaction of the commissioner his right to remain in

the United States. The opinion of the court thus proceeds (189 U. S., pp. 200, 201):

> As applied to aliens there is no question of the validity of that provision, and the treaty, the legislation, and the circumstances considered, compliance with its requirements can not be avoided by the mere assertion of citizenship. The facts on which such a claim is rested must be made to appear; and the inestimable heritage of citizenship is not to be conceded to those who seek to avail themselves of it under pressure of a particular exigency without being able to show that it was ever possessed. * * * The same reasoning in respect to the authority to exclude applies to the authority to expel, and the policy of the legislation in respect to exclusion and expulsion is opposed to numerous appeals; and we are not disposed to hold that where a Chinese laborer has evaded the executive jurisdiction at the frontier and got into the country he is therefore entitled to demand repeated rehearings on the facts.

The Chinese aspect of the matter is peculiar, of course, and the court was contemplating in that case a typical claim of citizenship without support in facts and not shown to be *bona fide* and meritorious. This aspect of the matter is not present in the case before the court, because here the facts are clear, and the claim made of American nationality or citizenship, of non-alienage, appears to be a pure question of law and construction. But the

reasoning and principle of the *Chin Bak Kan* decision justify the contention that the determination of a claim that an applicant is not in fact an alien is committed to the immigration officers on arrivals at the frontier as fully and properly as it is committed to commissioners in the peculiar jurisdiction of Chinese cases arising within the body of the country.

The decisions in the *Chin Bak Kan* case and the *Japanese Immigrant Case* were applied by United States District Judge Wheeler in the matter of *Moy Quong Shing et al.* on habeas corpus. The case is not yet reported. I give it in a separate appendix to this brief, along with a similar opinion of Judge Ray (*post*). I quote here from the opinion as follows:

> That such citizen [that is, a native-born citizen] of whatever race, on arriving at a port of this country, is entitled to come is not questioned or questionable. The contention now is that when such a claim is made, the executive officers have not authority to pass upon it, and that it must go for decision, if denied, to courts or judicial officers on some proper proceeding, of which this is said to be one. That the legislative department may exclude any race or classes of any race not citizens from the country, and identify and return those not entitled to come, by executive as well as judicial officers, seems to be too well settled by numerous and uniform decisions of the

> Supreme Court to require or warrant citations. And in *Chin Bak Kan* v. *United States* (186 U. S., 193) Mr. Chief Justice Fuller for the court said, after referring to *United States* v. *Wong Kim Ark*, where it was held that Chinese persons born in the United States are citizens, "It is impossible for us to hold that it is not competent for Congress to empower a United States commissioner to determine the various facts on which citizenship depends under that decision." It seems equally impossible to hold that when Congress can commit the execution of the law and the decisions of questions arising thereunder to the decision of executive officers, it can not also include the fact as to place of birth. The judicial powers of a commissioner are wholly conferred by act of Congress; and power to decide questions arising in executive proceedings may as well be conferred upon executive officers as upon others. These questions as to the place of birth of these applicants arose for decision, with other questions, before this officer, and no other way but for him to decide them is made apparent.

The writs were thereupon discharged and the Chinese persons remanded.

Within the last few days United States District Judge Ray in the northern district of New York has reached the same conclusion in the matter of *Sing Tuck or King Do* and thirty-one other Chinamen (not yet reported). The court, after citing the cases hereinbefore referred to, with others,

showing that Congress has full authority to confer upon executive officers of the Government plenary power to exclude or deport aliens of any nationality, says that, notwithstanding the claim of the Government that the power to exclude and deport aliens necessarily includes the power to try and determine the question whether the person excluded or proceeded against is an alien—

> It does not necessarily follow that, for purposes of exclusion or deportation, the power to determine who are aliens and who are citizens may be conferred by Congress on the executive officers or executive department of the Government.

The court proceeds:

> At first blush it would seem clear that a person claiming to be a citizen of the United States has the right to have that alleged fact, if disputed under circumstances involving his liberty and property rights, determined in the courts and according to the established rules and forms of legal procedure. If not so, then any citizen may be deported, in effect banished from the United States, if it is charged that he is an alien, and laws excluding and deporting all aliens are enacted, on the judgment of any executive officer on whom Congress may see fit to devolve the determination of the question of expulsion, etc., and consequently that of citizenship. * * * Has any decision of the Supreme Court of the United States gone to the extent of holding any such doctrine?

The opinion quotes from the *Nishimura* case, the *Lem Moon Sing* case, and the *Fok Yung Yo* case (185 U. S., 296, 305). It is pointed out that those cases refer to admitted aliens; and, quoting from *Wong Wing* v. *United States* (163 U. S., 228), wherein the court said that the United States can devolve the power and duty of identifying and arresting the persons included in a decree of exclusion or expulsion, the opinion asks the question whether in using the word "identifying" the court may not be understood as holding that it is competent for Congress to devolve upon executive officials the power to ascertain and determine who are and who are not aliens. The opinion further says:

> This court finds no case decided by the Supreme Court of the United States holding that Congress may commit to the Executive Department, under the interstate commerce clause of the Constitution, the right to determine finally the question of the citizenship of a person applying for admission into the United States.

The court then deals with the question as an original question, and holds that there is no distinction between an immigration inspector at the frontier and a United States commissioner within the country in regard to the nature of the authority exercised. "Neither is exercising the judicial power of the Government, for it is not vested in

either of them, and, as said, can not be." The conclusion is:

> It is competent for Congress to confer upon any inferior officer of the Government, especially those appointed by the Department of Commerce and Labor, which has power to regulate the coming of all persons into the United States, plenary power to determine the various facts on which citizenship depends (so far as they relate to persons applying for admission into the United States), and that an appeal may be taken to the Secretary of Commerce and Labor, whose decision shall be final. If no appeal is taken, then the determination of the inferior officer is, of course, final, res adjudicata of those facts [citing the Chin Bak Kan case]. Judgment has been passed by those officers competent and duly authorized and having jurisdiction to pronounce it, and this court is without power in this proceeding to annul or reverse it. The petitioners are not deprived of their liberty without due process of law, for they have had a competent tribunal in which to be heard, a hearing with opportunity to present their evidence, a judgment or determination, and the right of appeal, all according to the law of the land. This is due process of law. [Citing the *Japanese Immigrant Case.*] * * * It is not intended to hold, and this court is not to be understood as holding, that cases may not arise (extraordinary in their nature

and facts) where an appeal to the courts in appropriate proceedings may not be had; but under the facts of this case as presented to the court and as presented to the executive officers, noncompliance with the law on the part of those petitioners "can not be evaded by the mere assertion of citizenship" made at this time and in this manner.

(See separate appendix.)

It may be that a certain distinction is to be drawn between the decision of the status where the concrete fact as to place of birth will determine it, and where, as here, the facts are clear, and it may be said that a pure question of law arises thereon. But the controlling principle must be that the executive authority is to pass upon the whole inquiry, in which both facts and law are mingled, at least until, at the very end of the executive procedure, it may become the duty of the courts to say whether the vital question of citizen or subject status is of such a nature or is raised in such a way as to carry the inquiry on into the judicial jurisdiction.

The court has been heretofore advised of a proceeding before the district court of the United States in northern Ohio, wherein, upon the same logic drawn from the fear of unbridled executive action, it was held that a Chinese coolie, manifestly of that race, and of the ordinary laboring class, who had recently entered the country clandestinely, was not a Chinese person. The view of

the court was that, although it appeared that the man was born in China, of full-blooded Chinese parents and grandparents, his racial character should be shown by strict scientific proof, and ordinary impressions on the subject, and even the Chinaman's own testimony or admissions were mere matters of opinion. That was a case arising within the country and coming before the court on appeal from an order of deportation of a United States commissioner. The decision seems to the Government to deprive it absolutely of any power under existing law to remove these forbidden aliens from the country, and shows how the unqualified notion of a possible abuse of power may vitally injure the Government as well as protect an alien. The court thus indicates its views of the frontier aspect of the situation and of the danger that the executive authority might deport an undoubted citizen of the United States:

> What the Government might do through its executive officers we have nothing to do with in this court. The Government can say that you may go out and arrest anyone whom you please, whom you suspect to be a Chinese person, and deport them. We can not interfere with that. But when the Government provides that so far as arresting a person within the body of the community is concerned, it shall be done in the courts of justice, then it seems to be an intimation that the ordinary rules of courts of justice shall prevail and shall

> guide in determining the issues thus raised. * * * But when you may arrest anyone in the body of the country by process of law, affidavit, and warrant, and bring them to the bar of a court charged with being of a race practically deprived of rights that would exist if they were not of that race, that is another matter; because this arrest may be directed against any person in the community at the will of the maker of the affidavit. He is not excluded from arresting a citizen of the United States, a subject of Great Britain, or a citizen of any nationality. They may be brought in here under this charge, and the court can not distinguish as they come in whether they are persons who have rights or persons who have none. (Stenographer's transcript on bill of exceptions in *United States* v. *Hung Chang*, D. C. U. S. for the northern district of Ohio, eastern division; not yet reported.)

In certain cases in lower courts, arising both under the Chinese exclusion laws and other immigration laws, it has been held that the executive jurisdiction was not completely conclusive and did not oust the jurisdiction of the courts. (*In re Panzara*, 51 Fed. Rep., 275; *Gee Fook Sing* v. *United States*, 7 U. S. App., 27.) These cases were cited and distinguished in the *Lem Moon Sing* case (158 U. S., 549). See also *In re Martorelli* (63 Fed. Rep., 437), and the opinion of Judge Lacombe in the case at bar. (Rec., p. 7.)

In the customs jurisdiction the proceedings are,

of course, largely judicial, finally reaching the courts on review. The beginning, however, is the executive determination both on valuation and as to the rate and amount of duties. Respecting the former matter, that is, appraisement of value, the Board of General Appraisers performs an appellate executive function rather than the judicial function which they exercise on dutiable classification. Appraisement, then, is final with the executive authority (sec. 13, customs administrative act; *Passavant* v. *United States*, 148 U. S., 214) unless the appraiser or collector "has proceeded on a wrong principle contrary to law, or has transcended the powers conferred by statute." (*United States* v. *Passavant*, 169 U. S., 16.)

I think it must be admitted that the executive authority does not necessarily take jurisdiction in this field and determine finally and conclusively that it may do so even where there is an initial challenge on this point, because the cases show that to cause this peculiar jurisdiction firmly to attach and the remedy to be exclusive, it must first be conceded or shown that the merchandise affected is in point of fact embraced within the law. That is to say, this matter is jurisdictional at the threshold, and accordingly it was decided that where an article is claimed not to be "importable," not to be taxable or dutiable as imported merchandise (which claim was ultimately sustained; *The Conqueror*, 166 U. S., 110, 121), there is no remedy under the customs administrative act, and that law does not

apply. (*In re Fassett*, 142 U. S., 479, 487.) Similarly, in *De Lima* v. *Bidwell* (182 U. S., 1, 174) it was held that the customs jurisdiction does not attach when the particular merchandise was not brought from a foreign country, and was therefore not *imported*. The statement of Mr. Justice Blatchford in *In re Fassett* is quoted and approved, viz: "The collector has no authority to make a determination regarding an article which is not imported merchandise."

In the case referred to by Mr. Justice Holmes (*Miller* v. *Horton*, 152 Mass., 540) there was a statute of that State providing that "in all cases of farcy or glanders the commissioners, having condemned the animal infected therewith, shall cause such animal to be killed without an appraisal, but may pay the owner or any other person an equitable sum for the killing and burial thereof." The court say:

> Taken literally, these words only give the commissioners jurisdiction and power to condemn a horse that really has the glanders. The question is whether they go further by implication, so that if a horse which has not the disease is condemned by the commissioners, their order will protect the man who kills it in a subsequent suit, by the owner, for compensation. * * * When, as here, the horse not only is not to be paid for, but is to be condemned without appeal or without giving the owner a hearing or even notice, the grounds are very strong for

believing that the statute means no more than it says, and is intended to authorize the killing of actually infected horses only.

After reviewing the authorities the court concludes that the literal and, as it thinks, the true construction of the law seems to be the only safe one to adopt, and accordingly it is of opinion that the authority and jurisdiction of the commissioners to condemn the horse was conditional upon its actually having the glanders.

There is another analogy, drawn from a different field, it is true, in which, however, the same principle of the right of the executive to proceed in its jurisdiction free from intervention by the courts appears. It has been determined in many cases arising under the land laws, and showing challenges of the jurisdiction, that, as a general rule, a matter of administration in various Executive Departments can not, pending such administration, be taken away from the departments and carried into the courts. "These departments must be permitted to proceed to the final accomplishment of all matters pending before them, and only after that disposition may the courts be invoked to inquire whether the outcome is in accord with the laws of the United States." (*Brown* v. *Hitchcock*, 173 U. S., 473, 477.) This view sustains the suggestion which I have made above, that at least there was no right of invoking the courts in the present case until an appeal had been taken to the Secretary of the Treasury and denied.

On the other hand, and looking again to cases under the land laws, in *Menotti* v. *Dillon* (167 U. S., 703, 719) the court was considering the question of law whether the effect of a certain statute of the United States was to confirm to a State lands which at the time were withdrawn from preemption, etc. Affirming the doctrine that under that act certain questions of fact were for the land department to determine in accordance with the general doctrine sustaining the jurisdiction of the land department under acts of Congress, the court nevertheless was "of opinion that while the decision of the land department was conclusive as to all facts upon which it necessarily rested, it was not conclusive as to the question of law involved in the decision." The case suggests the inquiry in the present controversy whether the point is indeed a question of fact or a pure question of law, or a question of mixed fact and law.

Recurring to the earlier immigration cases in the lower courts, in *In re Panzara* (51 Fed. Rep., 275) the court was speaking of a case where the uncontradicted testimony showed that the petitioners were not alien immigrants and, holding that therefore it became the duty of the court to declare to be void the order of the immigration officer that the petitioners be returned to Italy, the court thus stated its conception of the law:

> The statute conferring power upon the superintendent of immigration to order the

> return of persons arriving in the United States from foreign countries confines his power to alien immigrants. He has no jurisdiction to direct the return to a foreign country of a person not an alien immigrant. The question, whether the petitioner is an alien immigrant, is therefore a jurisdictional one, and the finding of the commissioner upon that question is not conclusive upon the courts. That question, when presented to the court by a petition for habeas corpus, must be decided by the court upon the evidence presented to the court in such proceeding.

That case was decided June 1, 1892, and the law involved was evidently sec. 8 of the very act of 1891 now before the court.

In the case of *Martorelli* (63 Fed. Rep., 437), Judge Lacombe states that it was affirmatively and satisfactorily shown that on October 10, 1894, the relator did not belong to any one of the classes of aliens excluded from admission into the United States under the same act of March 3, 1891, and the other immigration laws then in force.

> These acts refer to aliens who are imported into or who migrate into this country, not to persons already residents here who temporarily depart and return. Sebastiano was an alien immigrant when he came here in 1887; he was not one when, after his temporary absence, he returned in October, 1894.

The court thus in that case largely relied upon

the distinction between an alien who seeks to enter this country for the first time, and one who is returning here after a temporary absence, and may therefore be regarded as not an *immigrant*. The *Panzara case* is cited as authority; and in that case also the petitioners claimed that they were not alien immigrants but residents of the United States, wherein they had acquired a domicile and were merely returning to their homes here after a voyage to Italy undertaken *animo revertendi*.

In *In re Neuwirth* (123 Fed. Rep., 347), it was held that under section 10 of the last immigration law (act of March 3, 1903, 32 Stat., 1213, 1216), providing that the decision of the special board, based on the certificate of the examining medical officer, shall be final as to the rejection of aliens afflicted with a loathsome or dangerous contagious disease as under the prior act of August 18, 1894, the only jurisdictional fact necessary to the conclusiveness of such decision is the alienage of the immigrant, and when that is shown the decision can not be reviewed by the court on the question of the existence or character of the disease. The language of the court is:

> Under this earlier act [the act of August 8, 1894], it has been repeatedly held that the only jurisdictional fact to be established in these cases was the alienage of the immigrant, and that when that appeared the court would not review the decision of the

board, either on habeas corpus or on certiorari. The language of the act of 1903 is somewhat different, but it is not thought that by thus modifying it Congress intended to provide that before the decision of the board could be accepted as final by the court it must first be made to appear by independent proof as a jurisdictional fact that the rejected alien was actually afflicted with the specified disease.

These cases appear to show as a matter of first impression that while all other matters are within the competence and exclusive right of decision of the specified executive officers, the question whether or not the applicant is an alien is not so. And at first blush it would seem to be necessary to grant that upon this point there is no difference, or little difference, between the extent of the executive authority originally conferred by section 8 of the act of 1891, and the more express or complete provisions of the act of August 18, 1894. It would thus apparently be necessary to admit that alienage or nonalienage is an essential jurisdictional question, which being determined, an incident or element of the jurisdiction, like the presence or absence of a particular disability, say a specified disease, would fall within the executive authority. In the Massachusetts case it is to be noted the question whether or not the particular animal was afflicted with the disease was itself the jurisdictional question. And this admission as reasonable

or necessary would not, perhaps, be much affected by the statement of Judge Lacombe in the present case, citing the cases of *Martorelli* and *Panzara*. The learned judge appears to say that those cases, which were decided after or without respect to the act of August 18, 1894, "held to the contrary" of the proposition that "upon all other questions the decision of the appropriate immigration officers, when adverse to the admission of the alien, is made final unless reversed on appeal to the Secretary of the Treasury." Judge Lacombe himself decided the *Martorelli* case. But as I read those cases they decided *in accordance with* that proposition, viz, that upon all other questions the executive decision is final, holding, however, as the emphatic question in such a case, that the jurisdiction essentially depends upon alienage.

Nevertheless in the case of *Lem Moon Sing* (158 U. S., p. 549) this court also points out that the *Panzara* case and a similar case under the Chinese exclusion laws do not support the Chinaman's claim that the action of the executive officers could be reached and controlled by the courts. The inference from the language is that the law of 1894 is more complete and effective in sustaining the exclusive executive power than the previous law, and the inference also is, notwithstanding the fact that Lem Moon Sing was an admitted alien, that the reach of the law includes any case and any claim of right, even such a claim as here, where a

person, *prima facie* an alien and excluded as such, insists that as matter of law and right she is not an alien in point of fact.

I confess that the question of the degree or scope of the executive right is difficult to define and maintain on undoubted principle in these peculiar circumstances. This perhaps explains why (unconsciously, as it were) counsel below and in this court did not fully investigate and submit the point with the authorities. The legal nature of the vital question, its national import, and its general importance, both to the United States and the island territories, concurred to bring forward the merits without sufficient attention to the preliminary inquiry. I now submit the above results of the investigation on the point of jurisdiction without further argument or remark thereupon except this, that, on the whole, the tendency of this court and of subordinate tribunals which have applied its decisions seems to be that the executive authority has the right and power to pass upon all questions presented, including the question whether a particular applicant is an alien or not; and the decision of that authority upon this question is final—absolutely so when the statutory course of executive appeal has not been followed, and generally so until and unless a competent court, after the executive remedy has been fully pursued, sees fit, because of peculiar and meritorious circumstances in the particular case,

to grant the remedial writ and draw over into the courts the jurisdiction otherwise exclusive and conclusive in the executive authority.

II.

ADDITIONAL COMMENT ON THE MERITS.

I endeavored to make it very clear in my brief and argument that I did not speak of the native inhabitants of Porto Rico as uncivilized. That the withholding of citizenship and the postponement of determining the exact status of the various island peoples were intended to include former Spanish subjects, natives of the peninsula, as well as the native inhabitants in the strict sense, is perfectly evident from the treaty and the laws and the protocol interchanges between the American and Spanish commissioners. The Spanish commissioners were simply endeavoring to obtain for all the inhabitants of the ceded territory the same right of preserving allegiance to Spain which was conceded to Spanish-born subjects of Spain. Not electing to preserve the allegiance to Spain, these "Peninsulars" were declared by the treaty to have adopted the nationality of the local territory, and thereupon they are necessarily assimilated in respect to civil rights and political status to the native inhabitants. The rights of all the inhabitants, in other words, coming under the allegiance and protection of the United States and possessing the nationality of the territory, shall be

determined by the Congress; and all such people are citizens of Porto Rico, and with the entirely distinct class of citizens of the United States residing in Porto Rico, constitute the body politic named The People of Porto Rico. The language of the law (sec. 7 of the Porto Rican act), amplifying the treaty stipulation, is that all inhabitants who were Spanish subjects on the crucial date, and then resided in Porto Rico and continued to reside there, with their children born subsequent to that date, excepting "Peninsulars" who had duly elected to preserve their allegiance to Spain, shall be deemed and held to be citizens of Porto Rico, etc.

I also endeavored to make it very clear that in discussing the motives and purpose of Congress in the alien-exclusion legislation, and emphasizing certain peculiar oriental and tropical dangers in the situation, I indicated a general view of the subject. I said that the standards of life and conduct in the Orient and Tropics, owing to many different conditions, were different from rather than inferior to our own. But it is obvious that in our own view at least, exercising our sovereign power and discretion to protect ourselves, the standards of the equator are less advanced than our own, however strongly individual examples and exceptions may show the contrary. It is not mere self-complacent satisfaction for an American to be aware of this general truth and the perfectly patent fact,

and there is no animadversion against any particular civilization or race in pointing it out as a well-known and existing fact upon which Congress proceeded in its legislation. At all events, no personal or racial susceptibilities could justly be touched simply because I suggested that the excluded defects and disabilities were more prevalent under the various conditions of climate and population in the Far East and the Far South than with us. We have too many defectives ourselves, but that is no reason why we should admit those from elsewhere.

I am not so foolish as to argue that the Government case can be made out by insisting upon ambiguous definitions. But such definitions manifestly indicate, as I said, that we can not be bound and held to mere words in this inquiry. I pointed out how, if we stand on literal terms, the definition of *alien* in Bouvier would include the woman here. Suppose, for another illustration of the vice in literalness, we take the definition given by the learned counsel from the Encyclopædia of Law (p. 10 of Mr. Coudert's brief): "An alien is a foreigner, a person resident in one country but owing allegiance to another." By the force of this, if we put out of sight for a moment the peculiar Federal relation—I mean the national interrelations in this novel situation between the United States and its island territories—a native inhabitant is an alien, a foreigner in the abstract, because he is resident in one country, Porto Rico, but he

owes allegiance to another, the United States. It will be recalled that Article XI of the treaty refers to the courts of *the country* and citizens of the country, speaking of these territories. And again this definition, if literal reading is insisted upon, might be construed to classify a native inhabitant as an alien *quoad* his own country, because, though resident there, he owes allegiance to another. Of course I know that such readings are *reductio ad absurdum*, because the meaning of *country* and *another* in that definition imports diverse sovereignties. But the very absurdity shows that in dealing with this unprecedented situation we must not be ruled by the mere symbols of the real concepts, or we shall undoubtedly stick in the bark.

As I construe and understand it, Mr. Coudert's argument simply states these propositions: That the word "citizen" has several meanings, a general one corresponding to subject and conveying merely the idea of membership in a nation, and a particular one implying the possession of complete political rights indicated by the phrase "active citizens;" that under the Norman or Saxon law rule of the *jus soli*, as distinguished from the civil rule of *jus sanguinis*, all persons born within the allegiance are subjects or citizens; and so are those taken over by conquest, acquisition, or cession, the relation of the latter class shifting again if there is a retrocession or other separation of the particular territory from the Crown; that since

the native inhabitants clearly owe allegiance and are entitled to protection, they have become American nationals, their "nationality" is American, by which word is signified "the element of homogeneity, by which all these people are united, regardless of internal and sectional differences, into a great nation, owing allegiance to a common government, as against all the other governments of the world" (Butler, Treaty-making Power, vol. 1, p. 16, note); that the change of allegiance, while it made the Porto Rican born before the cession a national or subject, did not necessarily make him a citizen; but that on the whole it is more compatible with sound political science and with public law, as well as with the spirit of our own laws, to hold that, notwithstanding the treaty reservation, the cession drew after it the result of transferring the allegiance of the inhabitants when the previously foreign territory became domestic, and of naturalizing the natives as citizens of the United States (*passive* citizens), entitled to all the rights, privileges, and immunities of such.

I have no objection to urge against any part of this argument except the conclusion. The extreme view that citizenship has been conferred is manifestly impossible to sustain. This case does not, of course, require the determination of that question, and the particular point presented is much narrower. I submit that consistently with Mr. Coudert's entire argument, excepting the untenable claim of collective naturalization by the

treaty, the result contended for by the Government stands, viz, that those who have become nationals merely so far as respects general allegiance and general protection have not lost their previous alien character by birth and race and on every other test so as to be entitled to unrestricted ingress into this country under the circumstances presented and the laws involved. This result, and not the learned counsel's result of necessary escape from the statutory disabilities of alienage, follows from the premises. For what is shown by their own illustrations from foreign analogies and international law? Simply that France recognizes peoples who have become subject to her as nationals in this same general sense, which is strictly limited by the correlative duty and right of allegiance and protection; that France on the whole has treated such nationals fairly, but not so fairly and liberally as we have treated the corresponding nationals who have come under our laws; that it required a legislative *décret* to confer French citizenship upon a particular and enlightened section of the Algerian inhabitants, roughly corresponding, I presume, to the "Peninsulars" among our "citizens of Porto Rico" or the Philippines; and that it required another law to confer and recognize even nationality (*de plein droit*) upon the Taïtans.

Non constat that the native inhabitants of Algeria or Tonquin who have not been affirmatively endowed with citizenship would have a free right of

entry into France. It nowhere appears that they have, although if it were so that fact would not be conclusive upon our situation.

Chief Justice Marshall, in *American Insurance Co.* v. *Canter*, intimated that under general principles of law the inhabitants of Florida were entitled, without the treaty stipulation, to the privileges, rights, and immunities of citizens in the more extended sense of the term, recognizing, in other words, the right of the inhabitants of an acquired territory to enjoy protection and liberty under the general principles of enlightened public law. This suggestion states the modern view and practice which the Florida and Louisiana treaties explicitly recognized. A review of the cases arising under those treaties, and of the recent insular decisions, shows conclusively, I think, underneath all the particular divergences of opinion, that in those cases a promise had been given in accordance with the enlightened attitude of all civilized nations, and agreeably to the spirit of our own institutions; that this promise was carried into effect through successive stages; first, of unorganized territorial government; next, of organized government of Territories in the full and formal sense; and last, of admission to statehood, which finally, in the complete sense, extended the rights of citizenship. Until this last point was reached the inhabitants were not truly citizens, and, indeed, were manifestly regarded, when the question was

raised, as aliens. This is the view of the *Laverty* case, which held that the effort of the Government after the admission of Louisiana into the Union, to continue to treat as aliens persons of foreign birth who had long been *bona fide* inhabitants of the Territory of Orleans, was an extreme extension of the principle and could not be sustained. But the necessary inference from that decision is that, until statehood had been attained, such inhabitants were in fact aliens, although, as in the case of Ohio, the people of the Territory, the real inhabitants, who were authorized to form a State government, consisted partly of citizens of the United States resident there and partly of foreigners. The precise point decided was that the inhabitants authorized by the law to form a State government were those who came into the Territory after the date of the treaty as well as those who were there at that time. But the import of the ruling is that until the admission of the State naturalized all of the *bona fide* inhabitants collectively, neither the treaty nor the intervening laws, while protecting them, moved them beyond the status of aliens.

The opposing brief asks what *commodum* has fallen to the petitioner in compensation for her burden. We might more justly ask what burden has been cast upon her, for counsel is speaking merely of her subject relation and not at all of the alien disability. At least the burden and benefit

are mutual and march together—the burden of allegiance, if it is one, and the benefit of protection. The benefit is the *nationality*, which in the international field we have conferred—the nationality of the particular territory and American nationality in general, because the territory is domestic and appurtenant to the United States.

It has reasonably been thought that the change of allegiance and nationality worked a great benefit, because the rule of Spain, even in modern years, was onerous and not helpful; was mainly for the benefit of the Crown in the end, and indifferent to the claims of local autonomy. A certain appearance of independence was extorted as the *dernier ressort* of a shaken and tottering government, but it was shadow and not substance. I think the United States has recognized and honored in full measure the claim of a *commodum* due to the petitioner and all other native inhabitants.

The decision of the Attorney-General (24 Op., 40) that a native Porto Rican, temporarily living in France on April 11, 1899, is a citizen of Porto Rico, and as such is an "American artist" whose paintings are entitled to certain privileges under the tariff act of 1897, was the logical and natural consequence of the change of allegiance, of the new right of protection. The decision does not go beyond recognition of the local nationality as *pro tanto* "American," and is entirely consistent with the similar rulings of the State Department set forth in my main brief.

Let us note again the reservation—"civil rights and political status." I do not know how language could more broadly cover the entire field, or show more irresistibly in connection with the previous immigrant exclusions and the cautious attitude of the treaty negotiators and of Congress, the general conception that in this entire subject the *status quo ante* was not to be changed. Of course the intention could be more explicitly phrased, and the court will determine the point on the terms of the various laws in connection with all the circumstances, irrespective of any theory that Congress consciously meant or unconsciously assumed the result for which I am contending. Nevertheless, I think that inference is necessary when all the facts are regarded. Among the civil rights and the elements of political status are manifestly included the relations of the island citizens to the body of the country, the nature and extent of the native citizenship rights in the island *locus*, the larger and later questions of national citizenship, statehood, Federal franchise, etc. These matters reveal no more obvious, necessary, and important feature than the privilege of freely entering the United States. Why is not that right, which is only denied to the relatively few inhabitants who both desire to come to this country and are afflicted with alien disabilities, included in the *civil rights* reserved?

Those who do not come or coming are excluded enjoy under the authority of the United

States, in the country of which they are citizens, all the fundamental rights of liberty and protection, for it has not yet been determined that trial by jury in the Philippines is such a fundamental right. They possess most of the rights of citizens of the United States. Those entitled to come here will receive the full protection and rights which aliens in common with citizens enjoy. Pending enlargement of the islanders' rights in their own countries or here, if or when Congress shall determine to augment the local scope in the Federal scheme, or extend the Federal citizenship to the local citizens by some method of collective naturalization—pending such events, I say, these new American nationals are differentiated in all the rest of the world from those who are total aliens to us by the protection which the United States has fully and willingly assumed among its international obligations. No prediction in this matter of the future is proper or possible, but I hazard the suggestion that the outcome will exhibit an orderly evolution and new application of the *Federal* principle—the notion of *federated* commonwealths responsive rather than tributary to the central guidance—and will not exhibit a republic's repetition of the monarchical government of dependencies.

It has been suggested as ridiculous that these nationals, in order to come within our uniform law of naturalization, are required to renounce

allegiance to the foreign state of which they may be at the time of declaring intention citizens or subjects (sec. 2165, R. S.), which these peoples can not do because the treaty itself in effect, by Article IX, transferred allegiance from Spain to the United States. It is suggested by this that these nationals are in a worse position than complete aliens.

It certainly is competent for Congress to provide a particular form of renunciation which would be a constitutionally uniform rule if applied to all nationals, having the effect of confirming in each individual case the general transfer or renunciation of the Spanish allegiance which the treaty effected. Such action by Congress would explicitly register the national or subject relation created by the treaty and laws. As Congress could do this relative to nationals coming into this country and desiring to become citizens and to reside here, so Congress could go further and authorize naturalization as Federal citizens in the islands themselves, whereupon free movement throughout any part of the country or its possessions would supervene.

To point out the present incongruity and ridicule it, however, is simply to beg the question, because, strange and unprecedented as the dilemma may be, this is precisely what was reserved, and the matter must continue in this anomalous state until Congress does, in fact, see fit to make

appropriate provision for the peculiar situation. It can not be doubted that Congress will at least speedily correct any discrimination in favor of aliens and against nationals legally resident here.

In many other ways than by the treaty and the organic laws for Porto Rico and the Philippines is it shown that any extension of the local rights and privileges, personal and general, requires a specific enactment. An examination of the various laws enacted by Congress during the past three years abundantly illustrate this view. For instance, in the army appropriation act of March 2, 1903 (32 Stat., pt. 1, pp. 927, 934), it is provided "that citizens of Porto Rico shall be eligible for enlistment in the Regular Army, and the Porto Rico regiment may be ordered for service outside of the island of Porto Rico." Under the general law applying to enlistment (act of August 1, 1894. 28 Stat., 215) only citizens of the United States, or those who have declared their intention to become citizens, are eligible for first enlistment in the Regular Army. The explicit nationalization of Porto Rican vessels and admitting them to the coasting trade (sec. 9, act of April 12, 1900), furnish another illustration of the principle. The argument of the other side is that because such special concessions have been explicitly given the whole case has been conceded; but manifestly that is not so. In respect to the present contention the islanders are aliens despite the special allowances, and are not citizens because of them.

Mr. Coudert italicizes, on page 28 of his brief, the following quotation from Cogordan on nationality: "Every national, indeed, is not a citizen, although every citizen is a national." I fully agree to the statement, and merely suggest that it may be completed so as to recognize the entire sovereign rights, and yet without inconsistency with principles of general law, by the following addition: *Some nationals, native and residing in remote territorial possessions, may be regarded as aliens as to particulars of domestic police and security, including the matter of ingress into the home country.*

Responding to a query from the bench, I am aware of no other region than that covered by the alien exclusions in which the Government contention would require us to treat native inhabitants as aliens. The reservations of the law, manifestly and constitutionally withholding complete citizenship and its vital characteristics, even if native inhabitants are not aliens in *any* respect, cover the rest of the ground.

This case has been regarded, and is submitted here by opposing counsel as involving a hopeless incongruity, an irreconcilable antinomy—to borrow a theological term. The essential fairness of the attitude of the United States is apparent as soon as we leave the logical fencing over the doctrines of international law and the dialectics based upon the definition of a word. There are no such comprehensive and exclusive categories, as counsel assert,

to be settled by the rules of a formal logic founded in the scholasticism of the past. The attitude of the United States simply is that dangerous or feeble defectives among our island inhabitants are not to be admitted to this country as if they were citizens. That is a just, natural, and reasonable attitude under all the circumstances presented. I submit, finally, that the supposed incongruity and antagonism are dissipated by the following statement: That former aliens by birth and race now under our sovereignty and protection in appurtenant domestic territory, and for that reason alone "nationals" of this country, are still aliens respecting proper immigrant exclusions, when the Spanish treaty and consequent laws preserved the *status quo ante*, and Congress has not affirmatively removed the ban.

HENRY M. HOYT,
Solicitor-General.

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In the Supreme Court of the United States.

OCTOBER TERM, 1903.

ISABELLA GONZALEZ, APPELLANT,
v.
WILLIAM WILLIAMS, UNITED STATES commissioner of immigration at the port of New York. } No. 225.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

APPENDIX TO SUPPLEMENTAL BRIEF FOR THE UNITED STATES.

APPENDIX A.

United States district court, district of Vermont.

IN RE MOY QUONG SHING ET ALS. ON HABEAS CORPUS.

(Not yet reported.)

OCTOBER 10, 1903.

WHEELER, J.

The persons detained are of the Chinese race, lately from China, and are restrained of their liberty at the port of Richford, where they sought to enter this country.

The petition set forth restraint in a detention house by persons acting as officers of the United States, and challenged their authority and the legality of their proceedings. The return of the petitionee, Weeks, shows that he is an officer of immigration, detaining the men under direction of Officer Schell, whose return, filed by leave of court, shows that he is an officer of immigration under control of the Commissioner-General in charge of this port by designation of the Secretary of Commerce and Labor. This seems to show regular and sufficient authority, within the act of 1903 (32 Stat., 828), placing jurisdiction in the Department of Commerce and Labor.

The proofs show that the men came by train and presented themselves for admission, and when reached were informed that they would then be examined as to their right to come in, and that, being questioned through an interpreter, they said they had been told by their parents that they were born within the United States, of which they had no recollection, and claimed to come in as native-born citizens. That such citizen, of whatever race, on arriving at a port of this country is entitled to come is not questioned or questionable. The contention now is that when such a claim is made the executive officers have not authority to pass upon it, and that it must go for decision, if denied, to courts or judicial officers on some proper proceeding, of which this is said to be one. That the legislative department may exclude any race or classes of any race not citizens from the country, and identify and return those not entitled to come by executive as well as judicial officers seems to be too well settled by numerous and uniform decisions

of the Supreme Court to require or warrant citations. And in *Chin Bak Kan* v. *United States* (186 U. S., 193) Mr. Chief Justice Fuller for the court said, after referring to *United States* v. *Wong Kim Ark*, where it was held that Chinese persons born in the United States are citizens:

> It is impossible for us to hold that it is not competent for Congress to empower a United States commissioner to determine the various facts on which citizenship depends under that decision.

It seems equally impossible to hold that when Congress can commit the execution of the law and the decisions of questions arising therein to the decision of executive officers it can not also include the fact as to place of birth. The judicial powers of a commissioner are wholly conferred by act of Congress; and power to decide questions arising in executive proceedings may as well be conferred upon executive officers as upon others. These questions as to the place of birth of these applicants arose for decision with other questions before this officer, and no other way but for him to decide them is made apparent.

It is claimed that the proceedings of this immigration officer, Schell, did not so conform to the rights of the applicants that the detention pursuant thereto was lawful. In the *Japanese Immigrant Case* (189 U. S., 86, at 100), Mr. Justice Harlan said:

> But this court has never held, nor must we now be understood as holding, that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in "due process of

law" as understood at the time of the adoption of the Constitution. One of these principles is that no person shall be deprived of his liberty without opportunity, at some time, to be heard, before such officers, in respect of the matters upon which that liberty depends—not necessarily an opportunity upon a regular, set occasion, and according to the forms of judicial procedure, but one that will secure the prompt, vigorous action contemplated by Congress, and at the same time be appropriate to the nature of the case upon which such officers are required to act. Therefore, it is not competent for the Secretary of the Treasury, or any executive officer, at any time within the year limited by the statute, arbitrarily to cause an alien who has entered the country and has become subject in all respects to its jurisdiction and a part of its population, although alleged to be illegally here, to be taken into custody and deported without giving him all opportunity to be heard upon the questions involving his right to be and remain in the United States. No such arbitrary power can exist where the principles involved in due process of law are recognized.

It appears that the immigration officer is governed by Chinese regulations made by the Department of Commerce and Labor, among which are:

> Rule 6. Immediately upon the arrival of Chinese persons at any port mentioned in rule 4 it shall be the duty of the officer in charge of the administration of the Chinese-exclusion laws to adopt suitable means to prevent communication with them by any persons other than officials under his control, to have said Chinese persons examined promptly, as by law provided, touching their

rights to admission, and to permit those proving such right to land.

Rule 7. The examination prescribed in rule 6 should be separate and apart from the public, in the presence of Government officials and such witness or witnesses only as the examining officer shall designate; and if, upon the conclusion thereof, the Chinese applicant for admission is adjudged to be inadmissible, he should be advised of his right of appeal and his counsel should be permitted, after duly filing notice of appeal, to examine, but not to make copies of, the evidence upon which the excluding decision is based.

Rule 21. The burden of proof in all cases rests upon Chinese persons claiming the right of admission to or residence within the United States to establish such right affirmatively and satisfactorily to the appropriate Government officers, and in no case in which the law prescribes the nature of the evidence to establish such right shall other evidence be accepted in lieu thereof, and in every doubtful case the benefit of the doubt shall be given by administrative officers to the United States Government.

It also appears that in these cases the officer in charge, with commendable care, informed each applicant that other witnesses would be heard and sent for, if there were any, and that no claim was made that there were any.

In the *Japanese Immigrant case* Mr. Justice Harlan further said:

> The traverse to the return made by the immigration inspector shows upon its face that she was before that officer, pending the investigation of her right to be in the United

> States, and made answers to questions propounded to her. It is true that she pleads a want of knowledge of our language; that she did not understand the nature and import of the questions propounded to her; that the investigation made was a "pretended one," and that she did not at the time know that the investigation had reference to her being deported from the country. These considerations can not justify the intervention of the courts.

Here the applicants presented themselves for examination for admission, and were held till, and were present when, it was had, and knew what was going on. They came for the examination, and should have come prepared with any evidence they had and wished to introduce to maintain their claims. That others were kept from them before or during the examination, or any prejudice to them in consequence of the rule, is not shown. They had, so far as appears, all the examination they wanted.

The rule of evidence prescribed may put upon the applicants more than proof to the satisfaction of the officer and require that beyond doubt; but the rules of evidence go with the authority to decide, and are included in it; and their correctness or their application furnishes no ground for interference.

Persons remanded.

APPENDIX B.

United States circuit court, northern district of New York.

IN THE MATTER OF SING TUCK, OR KING DO, AND THIRTY-ONE OTHERS.

RAY, District Judge.

The petitioners, Chinese persons, 32 in number, apply for discharge from custody in the Detention House at Malone, N. Y., on *habeas corpus*, alleging that they are citizens of the United States, illegally restrained of their liberty and illegally detained by Thomas Darcy, Chinese inspector of the United States of America, at Malone, N. Y., in what is known as "The Detention House." The petition for the writ is made by the attorney for the petitioners on information and belief.

It is admitted that the petitioners are Chinese persons; that they came from China and applied for admission into the United States at the port of Malone, N. Y., and were denied admission by the executive officers of the Government of the United States duly authorized to act and acting under and by virtue of the Chinese exclusion laws on the ground that they are citizens of China and not of the United States, and not shown to be within the classes entitled to admission. The petitioners were duly notified of their right to appeal from the decision refusing them admission to the Secretary of Commerce and Labor of the United States.

The petitioners have taken no appeal, but swear out a writ of *habeas corpus* in this court, alleging that they were born in the United States under circumstances making them citizens of the United States and that, as such, they have the right to have that fact tried and determined in the courts of the United States and by the judicial department of the Government, and that this question of citizenship can not be determined by the executive officers of the Government, at least, so as to bind them and deprive them of their right to appeal to the courts for a due trial and determination of that question of fact; that "due process of law" guarantees them this right.

When they applied for admission twenty-six of the petitioners stated that they were Chinese persons and made application for entry but refused to answer any other questions touching their right to enter. The other petitioners, six in number, stated that they were Chinese persons, applied for entry into the United States, and also stated that they were born within the United States, and refused to answer any other questions. No one of the petitioners offered to show citizenship, or to comply with the law relating to the entrance of Chinese persons into the United States.

The return to the writ shows the above facts, but denies that the petitioners are citizens of the United States or were born therein, and alleges in effect that the determination of the immigration officers and Chinese inspectors, not appealed from, is final and conclusive on the question of citizenship as well as all others involved, and that that question was necessarily involved and adjudicated in the determination made.

On the return of the proceedings under the writ, the United States district attorney for the northern district of New York, intervening in behalf of the United States and appearing in behalf of said Chinese inspector to whom the writ was directed, moved that the writ be dismissed and the petitioners remanded on the following grounds:

> First. This court has no jurisdiction to review the determination of the immigration officers of the United States in denying to the petitioners herein the right to enter the United States.
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> Second. That the determination of the immigration officers on the question of the right of the petitioners to enter the United States is final and conclusive, no appeal having been taken therefrom to the Secretary of Commerce and Labor.
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> Third. That it is not established by the petition and return that the petitioners, or any of them, have a lawful right to enter the United States.
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> Fourth. That the facts set forth in the petition and return show that the petitioners have no legal right to enter the United States.
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> Fifth. That the petitioners are not unlawfully detained or deprived of their liberty.

This court will take testimony and determine the question of citizenship unless the decision of the inspector acting under the Commissioner-General of Immigration and the Secretary of Commerce and Labor, not appealed from, is final and conclusive, *res adjudicata*, on the question of the citizenship of the petitioners, provided that question has been properly raised and presented by the record.

The one question is, Has Congress the constitutional power to confer upon the executive department, the executive officers of the Government, jurisdiction to try and finally determine adversely the question whether a person seeking to enter the United States is a citizen thereof and, as such, entitled to enter? Is this a political question? The other question is, Have the petitioners, or either of them, placed themselves in a position to raise this question of citizenship in this court?

That Congress has full authority to confer upon the executive officers of the Government plenary power to exclude and deport aliens of any nationality is settled.

Fong Yue Ting v. *United States*, 149 U. S., 698.

Wong Wing v. *United States*, 163 U. S., 228.

Chae Chan Ping v. *United States*, 130 U. S., 581.

Nishimura Ekiu v. *United States*, 142 U. S., 651–659.

Japanese Immigrant Case, 189 U. S., 86.

Lem Moon Sing v. *United States*, 158 U. S., 538.

It is claimed that the power to exclude and deport aliens necessarily includes the power to try and determine the question whether the person excluded or proceeded against is an alien. While Congress has the power to provide for the exclusion and deportation of aliens, and may fix the terms and conditions on which aliens may enter the United States or remain, being here, and also has the power to confer the authority to determine whether those terms and conditions have been complied with on executive officers of the Govern-

ment, it does not necessarily follow that, for purposes of exclusion or deportation, the power to determine *who are aliens and who are citizens* may be conferred by Congress on the executive officers or Executive Department of the Government.

The one question is, whether persons conceded to be *aliens* shall be admitted at all, or on or under certain conditions, the existence of which conditions is matter of proof, or deported if certain conditions have not been complied with, etc., and in no sense determines or adjudges the question of citizenship, which is not in issue, while the other question is one that involves the status, liberty, and property rights of the person or persons refused admission or proceeded against. A citizen has the right to live in the country of which he is a citizen; to go and come as he pleases, even to go to and return from a foreign country if he conforms to the quarantine and other laws on the subject, and to own property and exercise many rights not belonging to an alien, unless banished as a punishment for crime. The right to refuse all aliens admission into the United States is conceded.

A citizen of the United States can not constitutionally be refused admission. Aliens found in the United States may be deported simply because they are aliens.

A citizen of the United States can not, in any event, lawfully be deported, unless as a punishment for crime of which he has been duly convicted after a fair trial by the judicial department of the Government. Nor can he be excluded from the country. As an attribute of sovereignty a sovereign nation, as a means of self-preservation, both in times of war and times of peace, must

have, and has, the right to determine who shall be citizens thereof, and what persons not being citizens shall be permitted to enter or reside within its territorial limits, and also fix the terms and conditions on which such persons may remain, and also change them at will. But once admitted to citizenship in the United States, the person so admitted becomes a party to the Constitution, entitled to the benefits of its guarantees of protection according to and under the laws adopted in conformity thereto. At first blush it would seem clear that a person claiming to be a citizen of the United States has the right to have that alleged fact, if disputed under circumstances involving his liberty and property rights, determined in the courts and according to the established rules and forms of legal procedure. If not so, then any citizen may be deported, in effect banished from the United States, if it is charged that he is an alien, and laws excluding and deporting all aliens are enacted, on the judgment of any executive officer on whom Congress may see fit to devolve the determination of the question of expulsion, etc., and consequently that of citizenship. If no appeal is provided such judgment would be final and conclusive and the form or mode of trial (in the absence of legislative enactment) might depend on the mere whim or caprice of the executive officer clothed with power in the premises. Has any decision of the Supreme Court of the United States gone to the extent of holding any such doctrine?

It may be well to cite some of the cases and quote the language of the court.

In the *Nishimura case* (142 U. S., 651) the court said:

> It is not within the province of the judiciary to order that foreigners who have never been naturalized, nor acquired any domicile or residence within the United States, nor even been admitted into the country pursuant to law, shall be permitted to enter in opposition to the constitutional and lawful measures of the legislative and executive branches of the National Government. As to such persons the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law.

In *Lem Moon Sing* v. *United States* (158 U. S., 538) the court said:

> The power of Congress to exclude aliens altogether from the United States, or to prescribe the terms and conditions upon which they may come to this country, and to have its declared policy in that regard enforced exclusively through executive officers, without judicial intervention, is settled by our previous adjudications.

In *Fok Yung Yo* v. *United States* (185 U. S., 296–305) the court said:

> Congressional action has placed the final determination of the right of admission in executive officers, without judicial intervention, and this has been for many years the recognized and declared policy of the country.

In that case it was admitted that the petitioner was a subject of the Empire of China. On his arrival at the port of San Francisco he stated that he intended to pursue his journey to San Jose de

Guatemala. The collector refused to permit him to proceed further. *Habeas corpus* proceedings were then instituted. No question of citizenship was involved in that case, and it is clear under the decisions that the action of the executive officers was final and conclusive.

In the *Japanese Immigrant case* (189 U. S., 86) the court held:

> 2. It has been firmly established by numerous decisions of this court that it is within the constitutional power of Congress to exclude aliens of a particular race from the United States; prescribe the terms and conditions upon which certain classes may come to this country; establish regulations for sending out of the country such aliens as come here in violation of law; and commit the enforcement of such provisions, conditions, and regulations to executive officers without judicial intervention.
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> 3. An administrative officer, when executing the provisions of a statute involving the liberty of persons, may not disregard the fundamental principles of due process of law as understood at the time of the adoption of the Constitution. Nor is it competent for any executive officer, at any time within the year limited by the statute, to arbitrarily cause an alien who has entered the country, and has become subject in all respects to its jurisdiction, and a part of its population, although illegally here, to be arrested and deported without giving such alien an opportunity, appropriate to the case, to be heard upon the questions involving his right to be and remain in the United States.
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> Where, however, the alien had notice, although not a formal one, the courts can

not interfere with the executive officers conducting it. The objections of the alien to the form of the investigation could have been presented to the officer having primary control of the case, or by an appeal to the Secretary of the Treasury, and the action of the executive officers is not subject to judicial review.

But here no question of citizenship was involved.

In *Wong Wing* v. *United States* (163 U. S., 228) it was decided:

> Detention or temporary confinement, as part of the means necessary to give effect to the exclusion or expulsion of Chinese aliens, is valid.
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> The United States can forbid aliens from coming within their borders, and expel them from their territory, and can devolve the power and duty of identifying and arresting such persons upon executive or subordinate officials; but when Congress sees fit to further promote such a policy by subjecting the persons of such aliens to infamous punishment at hard labor, or by confiscating their property, such legislation, to be valid, must provide for a judicial trial to establish the guilt of the accused.

The court in its opinion said:

> We regard it as settled by our previous decisions that the United States can, as a matter of public policy, by Congressional enactment, forbid aliens or classes of aliens from coming within their borders, and expel aliens or classes of aliens from their territory, and can, in order to make effectual such decree of exclusion or expulsion, devolve the power and duty of identifying and arresting the persons included in such decree, and causing their deportation, upon executive or subordinate officials.

In using the word "identifying" did the court mean to be understood as holding that it is competent for Congress to devolve upon executive officials the power to ascertain and determine who are and who are not aliens?

In *Nishimura Ekiu* v. *United States* (142 U. S., 651) it was decided:

> The act of March 3, 1891, c. 551, forbidding certain classes of alien immigrants to land in the United States, is constitutional and valid.
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> Upon a writ of *habeas corpus*, if sufficient ground for the prisoner's detention by the Government is shown, he is not to be discharged for defects in the original arrest or commitment.
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> Inspectors of immigration under the act of March 3, 1891, c. 551, are to be appointed by the Secretary of the Treasury.
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> The decision of an inspector of immigration, within the authority conferred upon him by the act of March 3, 1891, c. 551, that an alien immigrant shall not be permitted to land because within one of the classes specified in that act is final and conclusive against his right to land, except upon appeal to the Commissioner of Immigration and the Secretary of the Treasury, and can not be reviewed on habeas corpus, even if it is not shown that the inspector took or recorded any evidence on the question.

In this case there was no pretense that the petitioner was a citizen of the United States.

In *United States* v. *Jung Ah Lung* (124 U. S., 621) the headnotes are as follows:

> A Chinese laborer, who resided in the United States on November 17, 1880, continued to reside there till October 24, 1883,

when he left San Francisco for China, taking with him a certificate of identification issued to him by the collector of that port, in the form required by the fourth section of the act of May 6, 1882, c. 126, 22 Stat., 58, which was stolen from him in China, and remained outstanding and uncanceled. Returning from China to San Francisco by a vessel, he was not allowed by the collector to land for want of the certificate, and was detained in custody in the port by the master of the vessel, by direction of the customs authorities. On a writ of *habeas corpus*, issued by the district court of the United States, it appeared that he corresponded in all respects with the description contained in the registration books of the custom-house of the person to whom the certificate was issued. He was discharged from custody, and the order of discharge was affirmed by the circuit court.

On appeal to this court by the United States, held:

(1) He was in custody under or by color of the authority of the United States, and the district court had jurisdiction to issue the writ.

(2) The jurisdiction of the court was not affected by the fact that the collector had passed on the question of allowing the person to land, or by the fact that the treaty provides for diplomatic action in a case of hardship.

(3) The case of the petitioner was not to be adjudicated under the provisions of the act of July 5, 1884 (c. 220, 23 Stat., 115), where they differed from those of the act of 1882.

(4) In view of the provisions of § 4 of the act of 1882 in regard to a Chinese laborer

arriving by sea, as distinguished from those of § 12 of the same act in regard to one arriving by land, the district court was authorized to receive the evidence it did in regard to the identity of the petitioner, and, on the facts it found, to discharge him from custody.

In *Lem Moon Sing* v. *United States* (158 U. S., 546, 547, 548) the court said:

> The contention is that while, generally speaking, immigration officers have jurisdiction under the statute to exclude an alien who is not entitled under some statute or treaty to come into the United States, yet, if the alien is entitled, of right, by some law or treaty, to enter this country, but is nevertheless excluded by such officers, the latter exceed their jurisdiction; and their illegal action, if it results in restraining the alien of his liberty, presents a judicial question for the decision of which the courts may intervene upon a writ of *habeas corpus*.
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> That view, if sustained, would bring into the courts every case of an alien who claimed the right to come into the United States under some law or treaty, but was prevented from doing so by the executive branch of the Government. This would defeat the manifest purpose of Congress in committing to subordinate immigration officers and to the Secretary of the Treasury exclusive authority to determine whether a particular alien seeking admission into this country belongs to the class entitled by some law or treaty to come into the country, or to a class forbidden to enter the United States. Under that interpretation of the act of 1894 the provision that the decision of the appropriate immigration or customs officers should be final, unless reversed on appeal to the Secretary of the Treasury, would be of no practical value.

The power of Congress to exclude aliens altogether from the United States, or to prescribe the terms and conditions upon which they may come to this country, and to have its declared policy in that regard enforced exclusively through executive officers, without judicial intervention, is settled by our previous adjudications. Is a statute passed in execution of that power any less applicable to an alien who has acquired a commercial domicile within the United States, but who having voluntarily left the country, although for a temporary purpose, claims the right under some law or treaty to reenter it? We think not. The words of the statute are broad, and include "every case" of an alien, at least every Chinese alien, who at the time of its passage is out of this country, no matter for what reason, and seeks to come back. He is none the less an alien because of his having a commercial domicile in this country. While he lawfully remains here he is entitled to the benefit of the guaranties of life, liberty, and property, secured by the Constitution to all persons, of whatever race, within the jurisdiction of the United States. His personal rights when he is in this country, and such of his property as is here during his absence, are as fully protected by the supreme law of the land as if he were a native or naturalized citizen of the United States. But when he has voluntarily gone from the country, and is beyond its jurisdiction, being an alien, he can not reenter the United States in violation of the will of the Government as expressed in enactments of the lawmaking power. He can not, by reason merely of his domicile in the United States for purposes of business, demand that his claim to

> reenter this country by virtue of some statute or treaty shall be determined ultimately, if not in the first instance, by the courts of the United States, rather than exclusively and finally, in every instance, by executive officers charged by an act of Congress with the duty of executing the will of the political department of the Government in respect of a matter wholly political in its character. He left the country subject to the exercise by Congress of every power it possessed under the Constitution.

In *Fong Yue Ting* v. *United States* (149 U. S., 713) the court said:

> The power to exclude or to expel aliens, being a power affecting international relations, is vested in the political departments of the Government, and is to be regulated by treaty or by act of Congress, and to be executed by the executive authority according to the regulations so established, except so far as the judicial department has been authorized by treaty or by statute, or is required by the paramount law of the Constitution to intervene.

In substance this is the effect of all the decisions bearing on the subject.

This court finds no case decided by the Supreme Court of the United States holding that Congress may commit to the executive department under the interstate-commerce clause of the Constitution the right to determine finally the question of the citizenship of a person applying for admission into the United States.

In *United States* v. *Wong Kim Ark* (169 U. S., 649) the petitioner applied to the collector of customs at San Francisco for permission to land and enter the United States. He was refused

admission and restrained of his liberty by the collector, who decided that he was not entitled to enter. The petitioner claimed citizenship, and this was the question before the courts. It was decided that he was a citizen and discharged on that ground. His citizenship was denied and directly in question. It does not appear that the right of the courts to intervene was challenged, or that it was claimed that the decision of the collector was final or conclusive.

In *Chin Bak Kan* v. *United States* (186 U. S., 193) it was charged that the petitioner, a Chinese person, knowingly and unlawfully came into the United States and was not entitled to remain. He was informed of the charge against him and advised that he would be permitted to make a statement without or with oath, or refuse to make any statement or to answer any question put to him, and was entitled to reasonable time to send for counsel and to procure the attendance of witnesses. He denied the charges made, but admitted that he had just come into the United States. The hearing and trial was had before a United States commissioner, who decided that the petitioner was a Chinese person and a laborer, and that he unlawfully entered the United States as charged in the complaint and was not entitled to remain therein. It was accordingly adjudged that he be removed from the United States to the Empire of China. The petitioner gave no proof that he was a citizen of the United States or of any country other than China. From the judgment of deportation an appeal was taken to the district court of the United States where the judgment of deportation

was affirmed. On appeal to the Supreme Court of the United States it was held that it was competent for Congress to empower a United States commissioner to determine the various facts on which the citizenship of a Chinese person depends. The court held that—

> A United States commissioner is a quasi judical officer, and in these hearings he acts judicially. Moreover, this case was taken by appeal from the commissioner to the judge of the district court and his decision was affirmed, so that there was an adjudication by a United States judge in the constitutional sense as well as by the commissioner acting as a judge in the sense of the statute.

The court further said in the opinion:

> By the law the Chinese person must be adjudged unlawfully within the United States unless he "shall establish by affirmative proof, to the satisfaction of such justice, judge, or commissioner, his lawful right to remain in the United States." As applied to aliens, there is no question of the validity of that provision, and the treaty, the legislation, and the circumstances considered, compliance with its requirements can not be avoided by the mere assertion of citizenship. The facts on which such a claim is rested must be made to appear. And the inestimable heritage of citizenship is not to be conceded to those who seek to avail themselves of it under pressure of a particular exigency, without being able to show that it was ever possessed.
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> Section 13 of the act of September 13, 1888, provides that any Chinese person, or person of Chinese descent, found unlawfully in the United States, may be arrested on a warrant issued upon a complaint under oath,

'by any justice, judge, or commissioner of any United States court," and when convicted, on a hearing, and found and adjudged to be one not lawfully entitled to be or remain in the United States, shall be removed to the country whence he came. "But any such Chinese person convicted before a commissioner of the United States court may, within ten days from such conviction, appeal to the judge of the district court for the district."

It seems to have been assumed during the years following the date of the act, and is conceded by the United States, that although most of its provisions were dependent upon the ratification of the treaty of March 12, 1888, and failed with the failure of ratification, that this section is in and of itself independent legislation and in force as such. Accordingly in this case an appeal was taken from the judgment of deportation rendered by the commissioner to the judge of the district court of the United States for the northern district of New York, and, upon hearing, the district court affirmed that judgment. From the judgment of the district court this appeal was taken under section 5 of the act of March 3, 1891, on the ground that the construction of the treaty of 1894 was drawn in question. Except in cases under that section where the question of jurisdiction alone is certified we have power to dispose of the entire case, but as the jurisdiction of the commissioner is sustained, we are of opinion that we can not properly reexamine the facts already determined by two judgments below. That is the general rule, and there is nothing to take this case out of its operation, and, on the contrary, the conclusion is a fortiori justified.

> The same reasoning in respect to the authority to exclude applies to the authority to expel, and the policy of the legislation in respect to exclusion and expulsion is opposed to numerous appeals. And we are not disposed to hold that where a Chinese laborer has evaded the executive jurisdiction at the frontier and got into the country, he is therefore entitled to demand repeated rehearings on the facts.

Article 5, amendments to the Constitution of the United States, provides, "No person shall be * * * deprived of life, liberty, or property without due process of law." * * *

We are thus brought to face with the proposition whether or not "due process of law" in determining the question of citizenship, when raised in proceedings to exclude or deport aliens, requires a trial and determination of the question in the courts of the United States by the judicial department of the Government? That to exclude from entry into the United States, or to deport therefrom, a citizen of the United States deprives him of life and property, in the constitutional sense, can not be successfully denied. Liberty includes not only the right to be out of prison, free to come and go, if the law is not violated in so doing, but to engage in all lawful pursuits, earn a livelihood, and own and enjoy property.

The powers or jurisdiction of the judicial department is thus defined by the Constitution, article 3, section 1:

> The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish. * * *

> SEC. 2. The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made under their authority, * * * to controversies to which the United States shall be a party. * * *

The fourteenth amendment to the Constitution declares who are citizens, and, as we have seen, no person is to be deprived of life, liberty, or property without due process of law. When a citizen of the United States seeks to enter the country and is denied the right to enter and refused entrance by the executive officers acting under a law of Congress authorizing them to exclude and refuse admission to alien Chinese, or Chinese persons, and such refusal of admission is sought to be justified on the ground that the party seeking entrance is an alien, and not a citizen, and such person is then held in custody to be returned to China and he appeals to the courts alleging that he is illegally restrained of his liberty and that he is a citizen of the United States, and is held under the determination of a tribunal having no jurisdiction to pronounce it, do we not have "a case" arising under the Constitution, or a controversy to which the United States is a party? Does not the judicial power extend to this class of cases and these controversies? And, if so, may Congress devolve the determination of the questions involved on the application for admission on the executive officers of the Government and make their decision final? But when we consider that we have a Government divided into departments—legislative, executive, and judicial—the making, the execution, and the interpretation of laws being committed to each,

respectively, it is not strange that there is found occasionally an apparent conflict of authority. The determination of all questions of fact relating to controversies between the United States and citizens thereof does not necessarily devolve upon or belong to the judicial department of the Government. There are many cases where the other departments are the sole and final arbiters in such controversies.

See *Johnson* v. *Towsley*, 13 Wall., 72–83.
French v. *Fyan*, 93 U. S., 169–172.
Quinby v. *Conlan*, 104 U. S., 420–426.
Steel v. *Smelting Co.*, 106 U. S., 450–453.

The Supreme Court has decided what facts must exist to constitute a person born in the United States of alien parents a citizen thereof. This is a determination by the judicial department of what the law is and as to what facts must exist to create that status. When a person comes to our shores seeking admission as a citizen, must the existence or nonexistence of the facts alleged by him be determined by the judicial department, or may that department which has authority over the coming of persons into the United States determine whether or not such facts exist? May not it ascertain and determine who are and who are not aliens? Would the law be operative and effective if the power does not exist? If such department may do this, then the question here is, Did the executive officers named have jurisdiction to ascertain the facts on which the citizenship of the petitioners depend? And of this there can be no serious question.

It is conceded that the petitioners are Chinese persons. They came from the Empire of China,

and if born within the United States must have departed therefrom. They sought to return to and enter the United States, and having returned to our borders they applied for admission into the United States. They presented no proof of citizenship and made no pretense of compliance with the laws relating to and regulating the return to the United States of Chinese persons. It must be competent for Congress to enact laws regulating the departure from and return to the United States of its own citizens. By the Constitution, Congress has power to regulate interstate commerce, and this includes the coming of persons—any person—into the United States.

Congress, in the exercise of this power, has seen fit to enact:

> SEC. 4. That the master of any vessel arriving in the United States from any foreign port or place with any Chinese passengers on board shall, when he delivers his manifest of cargo, and if there be no cargo, when he makes legal entry of his vessel, and before landing or permitting to land any Chinese person (unless a diplomatic or consular officer, or attendant of such officer), deliver to the collector of customs of the district in which the vessel shall have arrived the sealed certificates and letters as aforesaid, and a separate list of all Chinese persons taken on board of this vessel at any foreign port or place, and of all such persons on board at the time of arrival as aforesaid. Such list shall show the names of such persons and other particulars, as shown by their open certificates or other evidences required by this act; and such list shall be sworn to by the master in the manner required by law in relation to the manifest of the cargo.

See section 4, act of September 13, 1888:

> SEC. 12. That no Chinese person shall be permitted to enter the United States by land without producing to the proper officer of customs the certificates in this act required of Chinese persons seeking to land from a vessel.

See section 12, act of July 5, 1884:

> SEC. 12. That before any Chinese passengers are landed from any such vessel the collector or his deputy shall proceed to examine such passengers, comparing the certificates with the list and with the passengers; and no passengers shall be allowed to land in the United States from such vessel in violation of law; and the collector shall in person decide all questions in dispute with regard to the right of any Chinese passenger to enter the United States; and his decision shall be subject to review by the Secretary of the Treasury and not otherwise.

See section 12, act of September 13, 1888.

Was it not competent for Congress to make this law and make it applicable to all Chinese persons, whether citizens or aliens?

If so, then these petitioners were bound to show compliance with the law, and, not having done so, were properly denied admission.

Applying for admission, twenty-six of them made no claim of citizenship; the other six merely stated they were born in the United States, but made no statement and offered no evidence showing they were born in the United States under circumstances and conditions making them citizens. We have then a case of Chinese persons applying for admission into the United States

and making application to those officers authorized by law to identify Chinese aliens and refuse them admission. They made no claim and offered no proof of citizenship. Judgment having gone against them, as to their right to enter and necessarily as to their citizenship, they apply by counsel, who states on information and belief that they are citizens, for a writ of *habeas corpus*, seeking to try the question of their right to enter in the courts on a new plea or allegation of fact not before asserted by them. If this can be done every Chinese person applying for admission and refused can, by alleging citizenship, bring the matter into court and have this question determined by the judicial department of the Government and in the courts. It will be said there is no force in this proposition provided the petitioners have the constitutional right to appeal to the courts for a trial of this question of fact.

In *Chin Bak Kan* v. *United States* (186 U. S., 193) it was held that a United States commissioner is a *quasi* judicial officer, and that in the hearings under the Chinese exclusion laws he acts judicially. The court says: "But it is argued that the commissioner had no jurisdiction to act because the claim of citizenship was made." The court then states the facts necessary to make a Chinese person born in the United States a citizen of the United States, as held in *United States* v. *Wong Kim Ark* (169 U. S., 649), and then says: "It is impossible for us to hold that it is not competent for Congress to empower a United States commissioner to determine the various facts on which citizenship depends under that decision."

A United States commissioner is neither a court nor the judge of any court, nor is he vested by law with any part of the judicial power of the United States, for the judicial power is vested in the Supreme Court and "such inferior courts as the Congress may from time to time ordain and establish," and can not be vested in a commissioner, who is neither made a court, nor empowered to hold a court in the constitutional sense. True, he is an inferior officer of the court, appointed by it by authority of Congress, with defined and circumscribed powers, but no part of the judicial power of the United States is vested in him, nor can it be.

United States v. *Case*, 8 Blatch. (U. S.), 250.
United States v. *Schuman*, 2 Abb. (U. S.), 523.
In re Kaine, 14 How. (U. S.), 103.
United States v. *Clark*, 1 Gall. (U. S.), 497.

In *United States* v. *Case* (*supra*), Woodruff, J., said: "The commissioner holds no court. He acts simply as an arresting, examining, and committing magistrate."

In *United States* v. *Schuman* (*supra*), Field, J., said:

> The powers conferred are judicial in their nature, for judgment and discretion must be exercised, but they are not judicial in the sense in which judicial power is granted by the Constitution to the courts of the United States.

In *United States* v. *Clark* (*supra*), held, that a judge of the United States court, sitting as an examining magistrate, is not a court.

If, then, it is competent for the Congress to commit to United States commissioners the determina-

tion of the various facts on which the citizenship of a Chinese person depends, why is it not competent for Congress to commit to executive officers appointed by the heads of departments having jurisdiction of immigration and interstate commerce the determination of the facts on which the citizenship of Chinese persons applying for admission into the United States depends? All are inferior officers of the Government and possess those powers and those only which Congress confers. If in determining such a question a United States commissioner acts judicially and is a *quasi* judicial officer (because of his powers and duties, not because Congress devolved his appointment on the courts), why are not the executive officers duly empowered by Congress to hear and decide and pronounce judgment in these cases fully as much *quasi* judicial officers, and why do not they, too, act judicially in hearing and deciding these cases?

Neither the commissioner nor the inspector, etc., is exercising the judicial power of the Government, for it is not vested in either of them, and, as said, can not be. The Constitution, as we have seen, vests this power in the courts alone. It follows that a United States commissioner, in determining the various facts on which the citizenship of a Chinese person depends, while acting judicially, is neither possessed of nor exercising any part of the judicial power of the United States, and that under the holding in *Chin Bak Kan* v. *United States* it is competent for Congress to confer upon any inferior officer of the Government, especially those appointed by the Department of Commerce and Labor, which has power to regulate the coming of all persons into the United States, plenary

power to determine the various facts on which citizenship depends (so far as they relate to persons applying for admission into the United States), and that an appeal may be taken to the Secretary of Commerce and Labor, whose decision shall be final. If no appeal is taken, then the determination of the inferior officer is of course final, *res adjudicata*, of those facts. (*Chin Bak Kan* v. *United States*, 186 U. S., 193.)

Judgment has been passed by those officers competent and duly authorized and having jurisdiction to pronounce it, and this court is without power in this proceeding to annul or reverse it. The petitioners are not deprived of their liberty without due process of law, for they have had a competent tribunal in which to be heard, a hearing with opportunity to present their evidence, a judgment or determination, and the right of appeal, all according to the law of the land. This is due process of law.

In the *Japanese Immigrant case* (189 U. S., 86), at page 100, Mr. Justice Harlan said (speaking of due process of law):

> No person shall be deprived of his liberty without opportunity at some time to be heard before such officers (those clothed with authority in the premises) in respect to the matters upon which that liberty depends, not necessarily an opportunity upon a regular set occasion and according to the forms of judicial procedure, but one that will secure the prompt, vigorous action contemplated by Congress, and at the same time be appropriate to the nature of the case upon which such officers are required to act.

Here was such an occasion and such a hearing. The petitioners can not complain, for when called

upon to speak, and when it was their duty to speak, they remained mute, refusing to present the facts calling for a favorable decision if such facts existed. The proceeding was not a criminal action in fact or in its nature. The petitioners applied for admission into the United States and were bound to come prepared to show their right to enter, that right being denied. There is no pretense that they were denied a hearing or an opportunity to present evidence. The officers duly authorized to act, and acting according to law, heard and considered all the evidence offered or presented, and then gave judgment.

It may be remarked that the constitutional power of the Department of Commerce and Labor, under the interstate and foreign commerce clause of the Constitution, seems to be broad enough to give Congress power to confer jurisdiction on its officers to determine all questions of the right of persons to enter the United States, including the facts on which depends that of citizenship.

It is not intended to hold, and this court is not to be understood as holding, that cases may not arise (extraordinary in their nature and facts) where an appeal to the courts in appropriate proceedings may not be had, but under the facts of this case as presented to the court, and as presented to the executive officers, noncompliance with the law on the part of these petitioners "can not be avoided by the mere assertion of citizenship" made at this time and in this manner. (*Chin Bak Kan* v. *United States*, 186 U. S., 193.)

The petitioners assert that there is a decided distinction between the laws committing the decision of these questions to United States commis-

sioners and those devolving the power on inspectors of immigration. It is pointed out that in the case of commissioners an appeal to and review by a judge of the district court and then by the higher courts is provided for or permitted, and, hence, that there may be a hearing in the courts of the United States which constitutes due process of law, while no appeal to a judge or the courts from the decision of the inspector is permitted, only an appeal to the Secretary of Commerce and Labor. The trial and determination of the questions involved are committed to United States commissioners, and their decisions are final if not appealed from. If this provision is invalid (does not accord due process of law), it is difficult to see how the hearing before an officer having no jurisdiction is validated by giving the right of appeal from his decision to the courts having jurisdiction in such cases. The record upon which the courts pass when the case comes up on appeal is made by the commissioner, and it is the correctness of his conclusions on the law and facts that is reviewed on appeal. The case is not tried and determined *de novo*. If the commissioner has no jurisdiction, then the Chinese person proceeded against has had no constitutional trial or hearing, and the illegal and unauthorized proceeding can not be validated by the action of any appellate tribunal, its power being confined to a review of the proceedings had before the commissioner.

It follows from these considerations that the petitioners are not illegally held or detained. The writ must be dismissed and the persons remanded. So ordered.

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